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Second-Generation Source of Income Housing Discrimination

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SECOND-GENERATION SOURCE OF INCOME HOUSING DISCRIMINATION

Armen H. Merjian*

"[S]econd-generation barriers . . . have emerged in the covered jurisdictions as attempted substitutes for the first-generation barriers that originally triggered preclearance in those jurisdictions."[1]

Justice Ruth Bader Ginsburg

"As source of income protections increase, landlords are more likely to rely on other measures such as credit scores to eliminate tenants they see as undesirable."[2]

Amanda Insalaco

"What does lawful source of income discrimination look like? . . .
o A broker or landlord says you don't meet the minimum income requirement, even though the rent falls within the voucher payment standard."[3]

New York City Commission on Human Rights

INTRODUCTION

Plaintiff Keith Short, a homeless African American man living with AIDS, was eager to leave the emergency shelter to which he was consigned and secure his own apartment.[4] In January 2011, armed with a full housing subsidy from the New York City HIV/AIDS Services Administration ("HASA")—one that would pay full market rent directly to the landlord—Mr. Short visited Manhattan Apartments ("MA"), a large New York City real estate agency.[5] When he revealed that he would be relying upon a HASA subsidy to pay rent, the MA salesperson informed Mr. Short that he could not help him "because the landlords with whom MA worked did

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[1] Shelby Cnty. v. Holder, 570 U.S. 529, 592 (2013) (Ginsburg, J., dissenting).

[2] Amanda Insalaco, *Fifty Years Since Passage of the Fair Housing Act: Rent-to-Income Ratios in the Persistence of Residential Racial Segregation in Chicago*, 51 J. MARSHALL L. REV. 551, 579 (2018).

[3] N.Y.C. COMM'N ON HUM. RTS., LAWFUL SOURCE OF INCOME PROTECTIONS UNDER THE NYC HUMAN RIGHTS LAW (2022), https://www.nyc.gov/assets/cchr/downloads/pdf/materials/SOI_FactsheetCityFHEPS-2021Eng.pdf [https://perma.cc/NPF6-HYRB].

[4] Short v. Manhattan Apts., Inc., 916 F. Supp. 2d 375, 380–82 (S.D.N.Y. 2012).

[5] *Id.* at 381.

not accept programs."[6] MA later stipulated that at the time, it "had numerous one-bedroom apartments, and on any given day, dozens of one bedroom apartments, available to rent in the price range of [Mr. Short's subsidy] in its listings database."[7]

Mr. Short also visited Abba Realty ("Abba") but found that Abba was not showing him the attractive apartments touted in Abba's office window—apartments within the price range of his subsidy.[8] "Those apartments," he was informed, "are not available for people on programs. They're only for people who are working people."[9] When he pressed the issue, another Abba employee clarified: "Some apartments are for regular people, and some are for program people."[10] The message was not remotely nuanced: Mr. Short—homeless, disabled, and utilizing a housing subsidy—was not a "regular" person, and his choices were accordingly limited, notwithstanding his ability to pay the full market rent.

After the ensuing bench trial—New York's first ever trial for source of income ("SOI") discrimination[11]—the judge observed that Mr. Short's evidence of SOI discrimination "is not just a thick cloud of smoke, it is a smoking gun."[12] This was not unusual, for early, first-generation SOI discrimination cases often feature overt and direct evidence of discrimination.[13] Faced with such overwhelming proof,

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[6] *Id.* at 388–89.

[7] Plaintiffs' Post-trial Memorandum of Law at 24, Short v. Manhattan Apts., Inc., 916 F. Supp. 2d 375 (S.D.N.Y. 2012) (No. 11-cv-5989).

[8] *Short*, 916 F. Supp. 2d at 384.

[9] *Id.* (internal quotation marks omitted).

[10] Plaintiffs' Post-trial Memorandum of Law, *supra* note 7, at 14.

[11] *See*, *e.g.*, Tamica H. Daniel, *Bringing Real Choice to the Housing Choice Voucher Program: Addressing Voucher Discrimination Under the Federal Fair Housing Act*, 98 GEO. L.J. 769, 776 (2010) ("Source-of-income discrimination occurs where landlords refuse to rent to individuals because their source of income is a form of public assistance.").

[12] *Short*, 916 F. Supp. 2d at 397 (internal quotation marks omitted).

[13] *See*, *e.g.*, Attorney General v. Brown, 511 N.E.2d 1103, 1107 (Mass. 1987) ("The judge further found that Harold Brown . . . refused to process rental applications from holders of Section 8 certificates."); Franklin Tower One, L.L.C., v. N.M., 725 A.2d 1104, 1107 (N.J. 1999) ("Sava refused to accept the voucher or to execute the documents because it did not want to become entangled with the 'bureaucracy' of the Section 8 program."); Godinez v. Sullivan-Lackey, 815 N.E.2d 822, 825 (Ill. App. Ct. 2004) ("Sullivan-Lackey told him that she had a Section 8 voucher. Carlos stated that he did not accept Section 8 payments because he did not want to be audited."); Montgomery Cnty. v. Glenmont Hills Assocs., 936 A.2d 325, 331 (Md. 2007) ("[D]efendant refused to lease apartments to persons intending to use Section 8 vouchers, even if those persons would otherwise be acceptable tenants."); Feemster v. BSA Ltd. P'ship, 548 F.3d 1063, 1065 (D.C. Cir. 2008) ("When tenants tried to use their vouchers for rental payments, however, BSA refused to accept them or to execute the necessary lease agreements."); Comm'n on Hum. Rts. & Opportunities v. Hersh, No. CVH7605, 2009 Conn. Super. LEXIS 390, at *3 (Conn. Super. Ct. Feb. 18, 2009) ("When Cameron asked the man whether he accepted section 8 rental assistance payments the man replied no."); Cales v. New Castle Hill Realty, No. 10 Civ. 3426, 2011 U.S. Dist. LEXIS 9619, at *5–6 (S.D.N.Y. Jan. 31, 2011) ("Among the allegedly discriminatory

defendants typically proffer some sort of "administrative burden" defense: "[T]his defense essentially involves a claim that accepting individuals with government vouchers or subsidies imposes such burdens on the landlord, from form-leases to inspection requirements to delays in payment, as to absolve him of the obligation to accept such individuals."[14] This defense has, however, proven unavailing. Indeed, "courts have overwhelmingly rejected this defense,"[15] a defense "wholly unsupported, and unsupportable, under the relevant laws."[16]

Sadly, however, discrimination is never static, and discriminators, chastened by early defeats, learn to adjust their approach. They parry and camouflage, replacing blatant acts with methods that accomplish the same result by more nuanced means. Courts and commentators have repeatedly noted this trajectory from overt discrimination in the early life of a civil rights statute to second-generation discrimination. The Voting Rights Act of 1965, for example, "protected minority voters from attempts to dilute their voting power . . . . In response, states turned to 'second-generation barriers'—the principal tool being the gerrymandering of voting districts."[17] Likewise, "'[f]irst generation' Title VII suits involved . . . the blanket

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advertisements . . . were at least eight . . . all of which stated that 'no programs' would be accepted."); Bourbeau v. Jonathan Woodner Co., 549 F. Supp. 2d 78, 82 (D.D.C. 2008) ("[D]efendant's agent informed the tester that the apartment complex had reached its limit on accepting voucher holders as tenants and that it had not processed voucher applications for some time."); *see also* Paula Beck, *Fighting Section 8 Discrimination: The Fair Housing Act's New Frontier*, 31 HARV. C.R.-C.L. L. REV. 155, 155 (1996) ("Discrimination against rental subsidy holders seems to be as open and blatant today as was racial discrimination in the years preceding the enactment of the Fair Housing Act of 1968 ('FHA').").

[14] Armen H. Merjian, *Attempted Nullification: The Administrative Burden Defense in Source of Income Discrimination Cases*, 22 GEO. J. ON POVERTY L. & POL'Y 211, 212 n.5 (2015).

[15] *Id.* at 213.

[16] *Id.* at 212.

[17] League of Women Voters of Fla. v. Detzner, 179 So.3d 258, 298 (Fla. 2015) (citing Shelby Cnty. v. Holder, 570 U.S. 529, 563 (2013) (Ginsburg, J., dissenting)) ("Efforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot, are aptly described as 'second-generation barriers' to minority voting."); *accord* Holmes v. Moore, 840 S.E.2d 244, 255 (N.C. Ct. App. 2020) ("[T]he Court has recognized that outright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence. . . . [D]iscrimination today is more subtle than the visible methods used in 1965. Even 'second-generation barriers' to voting, while facially race neutral, may nevertheless be motivated by impermissible racial discrimination." (internal quotation marks omitted)); Ohio Democratic Party v. Husted, 834 F.3d 620, 641–42 (6th Cir. 2016) (Stranch, J., dissenting) ("As numerous cases recognize, those who seek to discriminate against a segment of the population do not trumpet their intentions—or do not do so publicly. The 2006 amendments to the VRA identified our progress as well as this continuing problem, noting that vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process." (internal quotation marks omitted)).

exclusion of women from certain positions," whereas "[t]oday's parade of Title VII cases present more and more subtle manifestations of discrimination."[18]

The same is true of SOI discrimination. After an early wave of overt cases, landlords and real estate agencies adjust their tactics in what may be described as "second-generation source of income discrimination." First-generation denials blatantly asserting that "no programs" are accepted, or "no Section 8,"[19] are replaced with discriminatory minimum-income requirements (e.g., imposing a minimum ratio of income to rent based upon the full rent rather than the applicant's share)[20] and minimum credit requirements (e.g., requiring minimum credit scores even where the government—and not the beneficiary—pays 100% of the rent directly to the landlord).[21]

This is a rapidly evolving field of civil rights practice, with many states only recently adopting SOI protections. Illinois enacted its SOI law in May of 2022.[22] Colorado's law came into effect in 2021, as did Rhode Island's.[23] Maryland and

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[18] Boyd v. Bechtel Corp., 485 F. Supp. 610, 612–13 (N.D. Cal. 1979); *accord* Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 930 (2016) ("Second generation discrimination may also be diffuse and structural, embedded in a variety of workplace practices, which means that it is harder to pinpoint as discrete and may compound over time."); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459–60 (2001) ("Smoking guns—the sign on the door that 'Irish need not apply' or the rejection explained by the comment that 'this is no job for a woman'—are largely things of the past. . . . Cognitive bias, structures of decisionmaking, and patterns of interaction have replaced deliberate racism and sexism as the frontier of much continued inequality."); *see also* Pedro A. Noguera, *Educational Rights and Latinos: Tracking as a Form of Second Generation Discrimination*, 8 LA RAZA L.J. 25, 25 (1995) ("The cumulative effects of civil rights laws and policies have substantially eliminated official forms of racial discrimination. However, new forms of bias and discrimination remain firmly intact in institutional practices and procedures. Moreover, due to their more subtle nature, these insidious forms of racial discrimination constitute barriers to racial justice that are in many ways more difficult to overcome.").

[19] "Section 8" refers to the federal Housing Choice Voucher program. *See* Robert G. Schwemm, *Source-of-Income Discrimination and the Fair Housing Act*, 70 CASE W. RES. L. REV. 573, 584 (2020) ("The Housing Choice Voucher ('HCV') program is the federal government's largest housing subsidy program, serving over 2.2 million low-income households comprising some 5.3 million individuals. Created by the 1974 Housing and Community Development Act, the program is sometimes called 'Section 8' after the provision in that statute authorizing it."). For examples of first-generation SOI discrimination, *see supra* note 13 and accompanying text.

[20] *See infra* Sections II.A., III.A.

[21] *See infra* Sections II.B., III.B.

[22] *See* POVERTY & RACE RSCH. ACTION COUNCIL, EXPANDING CHOICE: PRACTICAL STRATEGIES FOR BUILDING A SUCCESSFUL HOUSING MOBILITY PROGRAM APPENDIX B: STATE, LOCAL, AND FEDERAL LAWS BARRING SOURCE-OF-INCOME DISCRIMINATION 18 (2023), http://www.prrac.org/pdf/AppendixB.pdf [https://perma.cc/9KW8-P7VB] [hereinafter POVERTY & RACE RSCH.].

[23] *Id.* at 10, 33.

Virginia passed their laws in 2020, and New York in 2019.[24] Likewise municipalities: Charlotte, North Carolina adopted an SOI law in 2022 (becoming the first city in North Carolina to do so),[25] as did Tucson, Arizona; Tampa, Florida; and Albuquerque, New Mexico.[26] Akron, Ohio did so in 2021, and Atlanta, Georgia and Louisville, Kentucky adopted their SOI laws in 2020, to take but a small number of examples.[27]

Because this is a nascent area of law in myriad jurisdictions, courts and practitioners are largely or entirely unfamiliar with the relevant jurisprudence and its nuances and complexities.[28] Research in this field can be arduous and time-consuming, and relevant materials (e.g., human rights commission directives, unpublished decisions, and legislative history) can be difficult to identify or locate. This Article aims to provide courts and practitioners with the tools they need to address second-generation SOI discrimination, examining the most prevalent tactics and marshalling the relevant materials in one place. Part I of this Article provides a brief overview of SOI discrimination, demonstrating that such discrimination is rampant throughout the country, even in states and municipalities with SOI protections. Part II examines the statutes and authorities relating to the most common manifestations of second-generation SOI discrimination, namely minimum-income and minimum-credit requirements. Part III applies those authorities to voucher holders with both full and partial vouchers, demonstrating that these requirements are illogical and discriminatory when applied to voucher holders with no rental obligation, i.e., those with 100% of the rent paid by the voucher;[29] that income requirements not based upon the voucher holder's share of the rent are similarly discriminatory, and where voucher programs already calculate voucher holders' rent share based upon their income, there is no justification for imposing additional income requirements;[30] and that credit requirements for those with a rent share must at the very least be applied in a fair and reasonable manner so as not to frustrate the purpose of the SOI laws.[31] A brief Conclusion follows.

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[24] *Id.* at 21, 27, 37.

[25] *See*, *e.g.*, Genna Contino, *Charlotte Becomes First NC City to Pass Protections Against Income Discrimination*, CHARLOTTE OBSERVER (Aug. 23, 2022), https://www.charlotteobserver.com/news/politics-government/article264783344.html [https://perma.cc/BV7J-54TR].

[26] POVERTY & RACE RSCH., *supra* note 22, at 45, 77, 120.

[27] *Id.* at 79, 90, 137.

[28] *See, e.g.*, VA. REAL ESTATE BD., GUIDANCE DOCUMENT: HOUSING DISCRIMINATION ON THE BASIS OF SOURCE OF FUNDS 1 (Dept. of Pro. & Occupational Regul., 2021), https://townhall.virginia.gov/L/GetFile.cfm?File=C:\TownHall\docroot\GuidanceDocs\222\GDoc_DPOR_6978_v1.pdf [https://perma.cc/E7WK-7AWD] [hereinafter VIRGINIA GUIDANCE] ("Because the 'source of funds' protected class is new to Virginia, many questions have been raised regarding what may constitute this type of discrimination.").

[29] *See* discussion *infra* Sections III.A.1, III.B.1.

[30] *See* discussion *infra* Section III.A.2.

[31] *See* discussion *infra* Section III.B.2.

I. SOI DISCRIMINATION: A NATIONWIDE EPIDEMIC

In the absence of protection against SOI discrimination in the federal Fair Housing Act,[32] twenty states,[33] along with the District of Columbia and numerous municipalities,[34] have adopted SOI laws. As noted, the number is steadily growing, with several states and municipalities added just in the past few years.[35] This is a welcome trend, although hope persists that lawful SOI will be added to the Fair Housing Act to ensure nationwide protection.[36] The need could hardly be greater, for numerous reports and studies indicate that SOI discrimination remains rampant throughout the United States, even in states and municipalities with legal protections.

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[32] *See* Kaiser v. Fairfield Props., No. 20-CV-05399, 2022 U.S. Dist. LEXIS 25205, at *12 (E.D.N.Y. Feb. 11, 2022) ("It is beyond peradventure that neither section 8 tenants in and of themselves, nor 'source of income,' are protected classes enumerated under the FHA."); Merjian, *supra* note 14, at 216 ("The FHA does not, however, prohibit discrimination based upon source of income.").

[33] These are: California, Connecticut, Colorado, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, North Dakota, Oklahoma, Oregon, Rhode Island, Utah, Vermont, Virginia, Washington, and Wisconsin. For a full compilation of State, local, and federal laws barring source of income discrimination, *see* POVERTY & RACE RSCH., *supra* note 22.

[34] These include, for example, Miami-Dade, Florida; Albuquerque, New Mexico; St. Louis, Missouri; Cincinnati, Ohio; Philadelphia, Pennsylvania; Memphis, Tennessee; Atlanta, Georgia; and Louisville, Kentucky. *See* POVERTY & RACE RSCH., *supra* note 22.

[35] *See* discussion *supra* notes 22–27 and accompanying text.

[36] *See*, *e.g.*, Norrinda Brown Hayat, *Housing the Decarcerated: Covid-19, Abolition & the Right to Housing*, 110 CAL. L. REV. 639, 677–68 (2022) ("*Evicted* glosses over what is perhaps the largest hurdle—after appropriations—to the implementation of the universal voucher program: bias against voucher holders. . . . Adding source of income discrimination to the list of protected classes under the Fair Housing Act is a crucial step."); Schwemm, *supra* note 19, at 649 (2020) ("A source-of-income amendment, though not a panacea, would be an important step forward in expanding housing opportunities for all, in ending arbitrary limits on housing choice, and in helping the FHA achieve its core mission of reducing segregation."); Sara Pratt, *Civil Rights Strategies to Increase Mobility*, 127 YALE L.J. F. 498, 519–20 (2017) ("[T]he Fair Housing Act should be amended to include discrimination based on source of income. It must also provide adequate resources for organized national education and enforcement, as well as adequate notice and assistance to landlords who would be required to increase participation in voucher programs."); Kinara Flagg, *Mending the Safety Net Through Source of Income Protections: The Nexus Between Antidiscrimination and Social Welfare Law*, 20 COLUM. J. GENDER & L. 201, 261 (2011) ("An amendment to the Fair Housing Act that prohibits discrimination on the basis of a renter's source of income will contribute to ending pernicious discrimination in the housing context and help achieve 'truly integrated and balanced living patterns' across the United States.").

In New York City, for example, SOI discrimination leads all other housing complaints at the New York City Human Rights Commission ("NYCHRC").[37] As Deputy Commissioner, Sapna Raj, observed, "It is frustrating that although the law has been on the books since 2008, SOI discrimination is still so rampant in New York City."[38] The studies bear this out. A 2022 study, for example, found that "landlords and brokers routinely break the law by denying prospective tenants with vouchers outright, using unlawful requirements to deter them, or simply ignoring their texts, emails, and phone calls."[39] Tactics employed by landlords to exclude voucher holders, the study found, included elusive minimum-income ("you need to earn 40x the [monthly] rent") and minimum-credit requirements ("you need a minimum 750 credit score").[40]

More specifically, a September 2020 study found:

> People with housing subsidies heard back from agents nearly three times less often than those with income from employment.
>
> - Fewer than a quarter of those presenting as subsidy holders received any response from agents (21%), while well over half of those presenting with employment income received a response (61%).
>
> When subsidy holders did hear back from agents, they were more likely to be told that units were not available.
>
> - [A] quarter of those presenting as voucher holders were told that the units they inquired about were no longer available (25%), compared to only 6% of those presenting with employment income.
>
> Subsidy holders were less likely to be invited to view apartments than people with income from employment.

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[37] *See* David Brand, *Bronx Rental Complex Must Accept Housing Vouchers, Judge Rules*, CITY LIMITS (Aug. 1, 2022), https://citylimits.org/2022/08/01/bronx-housing-complex-must-accept-housing-vouchers-judge-rules [https://perma.cc/SV5N-XY3G] ("Source of income discrimination accounts for more fair housing complaints in New York City than any other illegal practice.").

[38] David Brand, *NYC Was Set to Crack Down on Voucher Discrimination, but Its Enforcement Teams Keep Shrinking*, CITY LIMITS (Mar. 18. 2022), https://citylimits.org/2022/03/18/nyc-was-set-to-crack-down-on-voucher-discrimination-but-its-enforcement-teams-keep-shrinking/ [https://perma.cc/QV9P-6KGK].

[39] UNLOCK NYC, NEIGHBORS TOGETHER, ANTI-EVICTION MAPPING PROJ. & HOUS. DATA COAL., *An Illusion of Choice: How Source of Income Discrimination and Voucher Policies Perpetuate Housing Inequality* 10 (2022), https://cdn.glitch.global/b185c63a-8d27-412b-b4cb-047ca0c8de79/AnIllusionofChoice_FinalDigital_CORRECT.pdf?v=1644419510693 [https://perma.cc/2KJE-LZRN] [hereinafter UNLOCK NYC].

[40] *Id.* at 30.

- [O]nly 7% of those presenting as subsidy holders were ultimately invited to view a unit, while 26% of those presenting with employment income were invited for a viewing.[41]

The study found that "[c]riteria and requirements presented by agents create additional barriers to obtaining housing," including elusive credit and income requirements.[42]

New York is by no means alone. A 2020 study of discrimination against voucher holders[43] in the Greater Boston area "uncovered evidence of discrimination based on voucher status in 86% of the tests. In many instances, housing providers screened out voucher holders and ceased all communication with them after learning that the individual intended to use a voucher."[44] "In the vast majority of cases," the study observed, "real estate professionals perpetuated the discrimination."[45] Similarly, in a 2019 study by the Chicago Lawyers' Committee for Civil Rights, "[s]ource of income discrimination occurred in 49 percent of the relevant tests."[46]

The studies cited thus far took place in areas with SOI protections. Discrimination against those with vouchers is undoubtedly even higher in areas without such protections,[47] as a September 2018 study prepared for the United States Department of Housing and Urban Development attests. The study found significant SOI discrimination in both Newark, New Jersey and Washington, D.C., where 31%

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[41] VOCAL-NY, & TAKEROOT JUST., *Vouchers to Nowhere: How Source of Income Discrimination Happens and the Policies that Can Fix It* 9 (2020), https://takerootjustice.org/wp-content/uploads/2020/09/Vouchers-To-Nowhere.pdf [https://perma.cc/M77H-8KT8].

[42] *Id.* at 10.

[43] Hereinafter, this Article will refer to vouchers and subsidies as "vouchers."

[44] JAMIE LANGOWSKI, WILLIAM BERMAN, GRACE BRITTAN, CATHERINE LARAIA, JEE-YEON LEHMANN & JUDSON WOODS, QUALIFIED RENTERS NEED NOT APPLY: RACE AND VOUCHER DISCRIMINATION IN THE METRO BOSTON HOUSING MARKET 6 (Sandy Kendall eds., 2020), https://housing-voucher-report-20200701.pdf [https://perma.cc/VFJ8-JWQA].

[45] *Id.*

[46] CHI. LAWS.' COMM. FOR C.R., 2018 FAIR HOUSE TESTING REPORT 11 (2019), https://www.chicago.gov/content/dam/city/depts/cchr/supp_info/FairHousingReportAUG2018.pdf [https://perma.cc/EYH2-GLG9].

[47] *See, e.g.*, ALLISON BELL, BARBARA SARD & BECKY KOEPNICK, PROHIBITING DISCRIMINATION AGAINST RENTERS USING HOUSING VOUCHERS IMPROVES RESULTS 1 (2018), https://www.cbpp.org/sites/default/files/atoms/files/10-10-18hous.pdf [https://perma.cc/YB2H-44QV] ("Voucher non-discrimination laws appear to be associated with substantial reductions in the share of landlords that refuse to accept vouchers, a recent U.S. Department of Housing and Urban Development (HUD) study has found, consistent with earlier analyses."); J. Rosie Tighe, Megan E. Hatch & Joseph Mead, *Source of Income Discrimination and Fair Housing Policy*, 32 J. PLAN. LITERATURE 3, 8 (2017) ("Early research shows promise for SOI antidiscrimination laws both increasing the likelihood of HCV recipients finding a place to live and moving to a higher-opportunity neighborhood.").

and 15% of landlords, respectively, did not accept housing vouchers.[48] Those municipalities have SOI laws. The figures were far worse for Fort Worth, Texas (67%) and Los Angeles, California (76%), however, municipalities that, at the time of the study, lacked SOI protections.[49]

As Matthew Desmond observed in his Pulitzer Prize-winning book *Evicted*, lack of safe and stable housing "is among the most urgent and pressing issues facing America today."[50] Perhaps the greatest barrier to securing that housing for indigent and low-income Americans is pervasive SOI discrimination, which affects millions of Americans,[51] and disproportionately people of color, the disabled, and women.[52]

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[48] MARY CUNNINGHAM, MARTHA GALVEZ, CLAUDIA L. ARANDA, ROB SANTOS, DOUG WISSOKER, ALYSE ONETO, ROB PITINGOLO, JAMES CRAWFORD & URBAN INSTITUTE, A PILOT STUDY OF LANDLORD ACCEPTANCE OF HOUSING CHOICE VOUCHERS xi (2018), https://www.huduser.gov/portal/sites/default/files/pdf/Landlord-Acceptance-of-Housing-Choice-Vouchers.pdf [https://perma.cc/4UEG-BKEC].

[49] *Id.* at xi–xiii. Both Los Angeles and the State of California later adopted source of income laws in 2019. *See* POVERTY & RACE RSCH., *supra* note 22, at 7, 48.

[50] MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 5 (2016).

[51] Fully 5.23 million Americans use the Housing Choice Vouchers program alone. iPropertyManagement.com, *Public Housing Statistics* (May 9, 2022), https://ipropertymanagement.com/research/public-housing-statistics [https://perma.cc/9PWE-83Z5].

In addition, there are 9.5 million beneficiaries of Social Security Disability Insurance annually. Social Security Administration, *Annual Statistical Report on the Social Security Disability Insurance Program*, 2020 (Nov. 2021), at 2, https://www.ssa.gov/policy/docs/statcomps/di_asr/2020/di_asr20.pdf [https://perma.cc/H7TD-BENV]. "There are myriad additional federal, state, and local sources of income and housing assistance, serving millions more." Merjian, *supra* note 14, at 216 n.23.

[52] For example, 28% of household with HCV vouchers have at least one family member living with a disability; 45% are African American; and "a staggering 83% of HCV households are female-headed, a common characteristic across all housing assistance programs." Jamie H. Wood, *Opportunity Gap: A Survey of State Source-of-Income Protection Laws and How They Address the Challenges Facing the Federal Housing Choice Voucher Program*, 55 U. RICH. L. REV. 691, 694 (2021); *see, e.g.*, Antonia K. Fasanelli & Philip Tegeler, *Combatting Source of Income Discrimination in Housing*, 38 GPSOLO 57, 57 (2021) ("Often, the denial of housing will serve as a pretext for a prohibited form of discrimination and disproportionately affects renters of color, women, and persons with disabilities."); Metro. St. Louis Equal Hous. and Opportunity Council, *Locked Out/Locked In: Section 8 Discrimination in St. Louis City* (2019), http://ehocstl.org/wp-content/uploads/2019/01/SOI-Discrimination-Report-1-2019-Final.pdf [https://perma.cc/4MQP-NT29] [hereinafter *Locked Out/Locked In*] ("There is also underlying racial discrimination with housing providers flatly refusing to accept Section 8 vouchers. According to HUD data, 94% of Section 8 voucher recipients in the City of St. Louis identify as Black or African American. A refusal to accept Section 8 vouchers means African Americans are disproportionately turned away from these housing providers."); Adam Culbreath, *Advocates' Efforts to Battle Landlords' Minimum-Income Requirements: An Overview*, 33 CLEARINGHOUSE REV. 620, 621 (2000) ("[E]ven if imposed without a

"Left underenforced, these practices prolong homelessness, exclude families from high-opportunity areas, exacerbate segregation, and negatively impact both physical and mental wellbeing."[53] Second-generation SOI discrimination is a major and growing contributor to this woeful state of affairs.[54]

II. SOI STATUTES AND AUTHORITIES REGARDING MINIMUM INCOME AND CREDIT REQUIREMENTS

It is common for landlords to apply minimum-income ratios—i.e., requiring a minimum ratio of income to rent—and minimum credit requirements as tools for screening rental applicants.[55] Use of these requirements, landlords assert, is standard

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discriminatory intent, minimum-income requirements may most heavily affect families with children, racial and ethnic minorities, women, and tenants with disabilities.").

[53] UNLOCK NYC, *supra* note 39; *see, e.g.*, Press Release, Off. of the Governor, *Governor McKee Signs Fair Housing Practices Act* (Apr. 19, 2021), https://www.ri.gov/press/view/40924 [https://perma.cc/GJ5H-ZZAE] (Statement of Rhode Island State Senator Meghan E. Kallman, sponsor of Rhode Island's SOI bill: "With this legislation, Rhode Island is finally recognizing that refusing to rent to people with housing vouchers is discrimination, a pretext for keeping certain people out of certain areas. . . . Income discrimination is unjust; it is a roadblock that hurts families, contributes to housing insecurity, and perpetuates poverty. Ensuring that voucher recipients can rent any apartment they can afford will allow more people to rent safe housing and contribute to the stability that all families need and deserve."); Wood, *supra* note 52, at 695 ("[V]oucher holders rarely obtain rental housing outside of areas of poverty or minority concentration."); Fasanelli & Tegeler, *supra* note 52, at 57 ("[S]ource of income (SOI) discrimination contributes to the perpetuation of racially segregated communities and neighborhoods with concentrated poverty."); discussion *infra* note 246 and accompanying text.

[54] Studies show that even first-generation discrimination persists, particularly in municipalities with weak penalties and weak enforcement. For example, in St. Louis, Missouri, the SOI law only permits the city to issue fines up to $500 for violations, *see* ST. LOUIS, MO., ORDINANCE NO. 67119 § 17 (2006), and enforcement is lax. *See* Editorial Board, Editorial, *Without Enforcement Teeth, Discrimination Abounds Against Section 8 Tenants*, ST. LOUIS POST-DISPATCH (Feb. 5, 2019), https://www.stltoday.com/opinion/editorial/editorial-without-enforcement-teeth-discrimination-abounds-against-section-tenants/article_371ad2e4-57ce-5216-8076-462799a15671.html [https://perma.cc/R9E9-WN8Y] [hereinafter *Without Enforcement Teeth*]. Not surprisingly, then, SOI discrimination is common and widespread in St. Louis, and it is quite often blatant. Over a six-week period of time, the St. Louis Equal Housing and Opportunity Council "found more than 100 different discriminatory advertisements on numerous listing sites such as HotPads, Zillow, Craigslist, WeTakeSection8, and others. These advertisements list a property in the City of St. Louis and the description in the advertisement makes it clear that participants in the Section 8 program are not welcome. The phrases used include, but are not limited to, 'No Section 8' or 'Not Section 8 Approved.'" *Locked Out/Locked In*, *supra* note 52.

[55] *See*, *e.g.*, Schwemm, *supra* note 19, at 641 ("This [minimum income requirement] is a common type of tenant-screening requirement . . . ."); Angela Littwin, *Escaping Battered Credit: A Proposal for Repairing Credit Reports Damaged by Domestic Violence*, 161 U.

industry practice, applied in a neutral manner, and thus nondiscriminatory.[56] The problem, however, is that these requirements are frequently not applied in a neutral manner, and are quite often discriminatory as applied to voucher holders, as the analysis in Section III, *infra*, demonstrates.[57] Before turning to that analysis, the following discussion sets forth the authorities addressing minimum-income and credit requirements under the SOI laws, including statutes, governmental agency interpretations, and case law.

A. Minimum-Income Requirements—Statutes and Authorities

1. Statutory Scheme

Washington, D.C.'s SOI statute expressly prohibits discrimination against "a prospective tenant seeking to rent with the assistance of an income-based housing subsidy based on . . . income level . . . ."[58] Many SOI statutes, however, do not specifically address the question whether a landlord may impose minimum-income ratios, and if so, in what manner.[59] Those that do generally take one of two approaches. Some statutes provide that a landlord may take income into account but

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PA. L. REV. 363, 417 (2013) ("Good credit has become an increasingly important component of basic economic citizenship, as more employers, landlords, and basic utility companies have incorporated credit reports into their standard practices.").

[56] *See*, *e.g.*, *Fulk v. Lee*, CV970063572, 2002 Conn. Super. LEXIS 499, at *4 (Conn. Super. Ct. Feb. 7, 2002) ("The defendant had claimed that their refusal to rent was based on their standard income requirements."); T.K. v. Landmark W., 802 A.2d 609, 612–13 (N.J. Super. Ct. 2001) ("Landmark West argues that it has absolute discretion to determine credit worthiness and the court has no authority to interfere with its 'business judgment.'"), *aff'd*, 802 A.2d 527 (N.J. Super. Ct. App. Div. 2002).

[57] *See also* Anna Reosti, *"We Go Totally Subjective": Discretion, Discrimination, and Tenant Screening in a Landlord's Market*, 45 LAW & SOC. INQUIRY 618, 648 (2020) ("[A] tight market in which more affluent renters compete with poorer applicants for housing enables landlords to adopt the type of exclusionary practices that many of these respondents indicated they would take up in an effort to circumvent new laws, such as raising credit and income-related criteria."); Statement of Michelle D. Thomas, Chief, Civ. Rts. Sec., Off. of the Att'y Gen. before the Comm. on Hous. and Neighborhood Revitalization (Feb. 20, 2020), https://oag.dc.gov/release/testimony-attorney-general-civil-rights [https://perma.cc/2GUV-3R8W]; ("[T]raditional income requirements don't make sense for voucher holders."); Aastha Uprety, *Impossible Minimum Income Requirements Prevent Voucher Holders from Finding Housing* (July 18, 2019), https://equalrightscenter.org/income-requirements-voucher-discrimination/#:~:text=This%means%20that%20housing%20providers,other%20legal%20sources%20of%20income [https://perma.cc/U8MK-5GZY] ("Minimum income requirements for rental properties are common, but often incorrectly applied for voucher holders.").

[58] D.C. CODE ANN. § 2-1402.21(g)(B). The statute creates an exemption for an inquiry as to "whether or not the level is below a threshold as required by local or federal law." *Id.*

[59] *See*, *e.g.*, COLO. REV. STAT. ANN. § 24-34-502(1)(l); 775 ILL. COMP. STAT. § 5/3-102; ME. REV. STAT. ANN. tit. 5 § 4581-A(4); N.J. STAT. ANN. § 10:5-12(g)(4); N.Y. EXEC. LAW § 296(5); OKLA. STAT. § 25-1452; UTAH CODE ANN. § 57-21-5.

require that this be done in a commercially reasonable or good-faith manner.[60] Others expressly mandate that any income requirements be applied only to the voucher holder's share of the rent.[61] Notably, none of these statutes provides that it is permissible to apply income requirements to both the voucher holder's share and the government's share of the rent. As the discussion in Section III, *infra*, makes clear, this practice is in fact unreasonable no matter what approach the statute takes.

Indeed, Connecticut's statute, which represents an unusual, third category, expressly provides that the SOI law "shall not prohibit the denial of full and equal accommodations solely on the basis of insufficient income,"[62] without any express mandate that such practices be conducted in a commercially reasonable or good-faith manner. Nonetheless, the Connecticut Supreme Court has repeatedly ruled that

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[60] *See*, *e.g.*, DEL. CODE ANN. tit. 29 § 4607 (SOI prohibitions "shall not limit the ability of any person to consider the sufficiency or sustainability of income, or the credit rating of a renter or buyer, so long as sufficiency or sustainability of income, and the credit requirements, are applied in a commercially reasonable manner and without regard to source of income."); MD. CODE ANN. § 20-704(d) ("The prohibitions in this subtitle against discrimination based on source of income do not: (1) Prohibit a person from determining the ability of a potential buyer or renter to pay a purchase price or pay rent by verifying in a commercially reasonable and nondiscriminatory manner the source and amount of income or creditworthiness of the potential buyer or renter."); FREDERICK, MD., CODE app. F. § 3(j)(1) ("The prohibitions in this Ordinance against discrimination because of source of income do not prohibit . . . a commercially reasonable verification of a source and amount of income."); LANSING, MICH. CODE § pt. 2, tit. 12, ch. 296.04(d) ("With respect to the source of income provision only, nothing contained in this chapter shall be construed to preclude the making of a good faith business determination involving a person's ability to meet the financial burden involved in the sale, lease, rental, sublease, assignment or transfer of housing accommodations.").

[61] *See*, *e.g.*, CAL. GOV. CODE § 12995(o) (Making it unlawful: "In instances where there is a government rent subsidy, to use a financial or income standard in assessing eligibility for the rental of housing that is not based on the portion of the rent to be paid by the tenant."); 34 R.I. GEN. LAWS § 34–37–4(c) ("If a landlord requires that a prospective or current tenant have a certain minimum level of income, the standard for assessing eligibility shall be based only on the portion of the rent to be paid by the tenant, taking into account the value of any federal, state, or local rental assistance or housing subsidy."); WASH. REV. CODE § 59.18.225(h)(3) ("If a landlord requires that a prospective tenant or current tenant have a certain threshold level of income, any source of income in the form of a rent voucher or subsidy must be subtracted from the total of the monthly rent prior to calculating if the income criteria have been met."); CITY OF TAMPA, FL, CODE ch. 12, art VII, § 12–143(a)(3) (It shall be unlawful "[t]o use a financial or income standard in assessing eligibility for the rental of a rental unit that is not based on the portion of the rent to be paid by the tenant in instances where there is a government rent subsidy or assistance, which will be used to pay for a portion of the rent for that rental unit."); COLUMBUS, OHIO, CODE tit. 45, ch. 4551.03(b) ("If an operator requires that a prospective tenant or current tenant have a certain threshold level of income, any source of income in the form of a rent voucher or subsidy must be subtracted from the total of the monthly rent prior to calculating if the income criteria have been met.").

[62] CONN. GEN. STAT. § 46a–64c(b)(5).

minimum-income ratios that are applied to the total rent, rather than merely the voucher holder's share, are discriminatory under the SOI law, both vis-à-vis those with a full voucher and those with a partial voucher.[63] And in Virginia, where the SOI statute does not address income requirements, the governmental body charged with enforcing the SOI law has admonished that such requirements must be "commercially reasonable"; expressly noting that this means that income requirements must be based upon the voucher holder's share of the rent.[64]

2. Governmental Agency Interpretations and Case Law

(a) Agency Interpretations

The NYCHRC, in its "Best Practices for Housing Providers to Avoid Source of Income Discrimination," addresses the question whether a landlord may reject applicants with vouchers based upon minimum-income requirements under the New York City Human Rights Law.[65] The NYCHRC expressly admonishes that such a rejection constitutes discrimination:

> Q5. May I require all applicants to make a minimum income such as $68,000 annually or 43x the monthly rent?
>
> A5. When a voucher program calculates the tenant(s)' rent based on their income, the government has already determined that they can afford to pay their required portion. In some instances, tenants will pay no portion of the rent out of pocket. Where the tenants' rental portion is calculated based on the tenants' income, it is a violation of the Law to impose any additional income requirements on applicants for housing.[66]

The NYCHRC reiterated this principle in April 2021:

> What does lawful source of income discrimination look like? . . .
> - A broker or landlord says you don't meet a minimum income requirement, even though the rent falls within the voucher payment standard.[67]

The New York State Division of Human Rights ("NYSDHR") has reached the same conclusion:

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[63] *See* discussion *infra* notes 106–18 and accompanying text.

[64] *See* discussion *infra* notes 72–73 and accompanying text.

[65] *Best Practices for Housing Providers to Avoid Source of Income Discrimination*, N.Y.C. COMM'N ON HUM. RTS. 1 (Mar. 2023), https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/FairHouse_FAQs-Landlord-English.pdf [https://perma.cc/M7QW-C7WU] [hereinafter *Best Practices*].

[66] *Id.*

[67] N.Y.C. COMM'N ON HUM. RTS., *supra* note 3, at 1.

Can a housing provider have any wealth or income requirements?

- Any income or wealth requirements for vouchered tenants cannot be used as a subterfuge to avoid the law, or have the effect of frustrating the purpose of the Law. A housing provider cannot have a facially neutral income or wealth requirement that is equally applied but has the effect of excluding populations with rental subsidies.
- Housing providers cannot set unreasonable income formulas or wealth requirements for subsidized tenants. Persons receive vouchers because they have low income and lack wealth. Unreasonable wealth requirements could exclude everyone with a voucher and negate the intended protections of the law. N.Y. Exec. L. §300.
- For example, a requirement of a certain level of income based on a formula tied to the rental cost, even though required of other tenants, would be unreasonable if applied to a tenant who has 70% to 100% of the rent paid by the vouchering agency.[68]

As more fully discussed below,[69] the New Jersey Division on Civil Rights found probable cause for SOI discrimination where "[r]espondent's minimum income requirement had no relationship to what complainant would be required to pay in monthly rent, and no relationship to complainant's ability to pay that portion of the rent."[70]

The Virginia Real Estate and Fair Housing Boards, which are responsible for enforcing Virginia's Fair Housing Law,[71] have issued a guidance ("Virginia Guidance") on SOI discrimination under Virginia's recently adopted SOI law (with SOI labelled "source of funds" in the law). It is the most comprehensive of the governmental interpretations of SOI laws and warrants full quotation here. The Virginia Guidance instructs that housing "providers can ask about income on an application and verify same," provided that this is done "in a commercially reasonable manner."[72] The Virginia Guidance warns, however:

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[68] N.Y. DIV. OF HUM. RTS., GUIDANCE ON PROTECTIONS FROM SOURCE OF INCOME DISCRIMINATION IN HOUSING UNDER THE NEW YORK STATE HUMAN RIGHTS LAW 1, 5 (2020), https://dhr.ny.gov/system/files/documents/2022/05/nysdhr-soi-guidance-2020.pdf [https://perma.cc/44HH-S76J] [hereinafter N.Y. GUIDANCE].

[69] *See* discussion *infra* notes 126–31 and accompanying text.

[70] Finding of Probable Cause at 5, Moran v. Tower Mgmt. Servs., 2018 WL 6272934 (N.J. Div. on Civ. Rts. 2019) (No. A-2616-16T4); *see* discussion *infra* notes 126–31 and accompanying text.

[71] VIRGINIA GUIDANCE, *supra* note 28, at 1.

[72] *Id.* at 3.

> Housing providers should be careful to ensure this otherwise neutral criteria is not applied in a manner that results in the automatic disqualification of HCV holders who, by definition, have a portion of their rent paid by a third party.
>
> To determine if a tenant can afford the rent, the relevant factor for a landlord's risk assessment is the *tenant's portion* of rent, not the total rent. The voucher portion of the rent is secured under a contract with the administrative agency that has already qualified the HCV holder. The landlord's reasonable focus should be on whether the tenant can afford the tenant's share of the rent. Therefore, to avoid source-of-funds discrimination liability, housing providers should subtract any source of funds from a rental assistance program (like the HCV) from the total of the monthly rent prior to calculating whether the tenant satisfies the income criteria.
>
> Subtracting the HCV portion from the total rent leaves the amount for which the tenant will be responsible. It is that figure against which the prospective tenant's other income should be compared. Housing providers who add the voucher payment to a tenant's other income and then use that total to determine if criteria are met improperly treat the voucher portion.[73]

The Virginia Guidance then provides specific examples of rent-to-income calculations. The first demonstrates how to permissibly apply such a ratio to a voucher holder:

> EXAMPLE 1: A housing provider requires all tenants, regardless of their source of funds, to demonstrate that they have income that is three times the amount of the monthly rent. The monthly rent for the unit in question is $1,000. The tenant earns employment income of $800 per month. Under the terms of their HCV, the tenant pays $240 per month towards rent (30% of their income), and the HCV agency pays the remainder, or $760.
>
> The housing provider subtracts the HCV portion from the total rent to get the tenant's share of rent: $1,000 - $760 = $240. The housing provider then determines that the tenant meets the income-qualifying standard because the tenant's employment income ($800) is at least three times as much as the tenant's share of the monthly rent, $240 when multiplied by three is $720. This application of income-qualifying criteria does not discriminate against HCV holders who apply to live in this complex.[74]

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[73] *Id.* at 4 (citations omitted).
[74] *Id.* at 4–5.

The second illustrates a discriminatory rent-to-income calculation. Merely adding the applicant's income to the value of the voucher, the Guidance explains, constitutes SOI discrimination:

> EXAMPLE 2: A landlord requires all tenants, regardless of their source of funds, to demonstrate that they have income that is three times the amount of the monthly rent. The monthly rent for the unit in question is $1,000. The tenant earns employment income of $800 per month. Under the terms of their HCV, the tenant pays $240 per month towards rent (30% of their income), and the HCV agency pays the remainder, or $760.
>
> To determine whether this prospective tenant meets the income criteria, the landlord adds the tenant's employment income to the monthly HCV funds: $800 + $760 = $1,560. The landlord declines to rent to the prospective tenant because $1,560 is not at least three times the monthly rent ($3,000). This method of calculating income discriminates against HCV holders.[75]

The key, the Virginia Guidance emphasizes, is to avoid using "information about income or the source of income in a way that has either the intent or effect of frustrating the purpose of the law."[76]

The Cook County (Chicago) Human Rights Commission, interpreting this question, opined that income ratios cannot be formulated as a pretext for SOI discrimination:

> Landlords should not be tempted to introduce a rent-to-income ratio specifically designed to exclude all HCV [i.e., Section 8 voucher] applicants. First, the Commission will scrutinize any selection criteria that is being used pretextually to achieve an unlawful purpose. Second, under some circumstances, an HCV tenant with no income would not be responsible for any portion of the landlord's rent under the HCV program rules. Such a tenant would, in effect, have an infinite rent-to-income ratio when compared to that of a market applicant.[77]

Hence, "in order to calculate the rent-to-income ratio of a prospective [HCV] tenant, a landlord should only consider the portion of the rent that the HCV applicant would actually be directly responsible for."[78]

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[75] *Id.* at 5.

[76] *Id.* at 8.

[77] Letter from Ranjit Hakim, Exec. Dir. of the Cook Cnty. Dep't of Ethics and Hum. Rts. to the Assistant Dir. of Gov't Affs., Ill. Assoc. of Realtors 2 n.1 (Oct. 23, 2013) (on file with author).

[78] *Id.* at 2; *accord* Insalaco, *supra* note 2, at 572 ("Though rent-to-income ratios are permissible in Cook County, landlords may only apply the ratio requirement to the share of rent the tenant is responsible for.").

Finally, the Portland (Oregon) Housing Bureau ("PHB") "is responsible for leading housing policy for the City of Portland and administering programs to produce affordable rental housing, increase and stabilize homeowners, prevent and end homelessness, and regulate and assist landlords and tenants in the rental housing market."[79] The Portland SOI law expressly provides that the law does not prohibit "[i]nquiry into, evaluation of, and decisions based on the amount, stability, security or creditworthiness of any source of income."[80] Nonetheless, in its guide to landlord-tenant law, the PHB expressly instructs:

> How are income-to-rent ratios evaluated?
> When evaluating an applicant's income-to-rent ratio, a landlord is required to: . . .
>
> - Base calculations on: a) a rental amount that is reduced by the amount of any local, state, or federal government rent voucher or housing subsidy available to the applicant . . . .[81]

To the extent the above governmental agencies are responsible for administering or enforcing the SOI laws, they are entitled to deference in their interpretations.[82] Accordingly, their constructions of the SOI laws, if not irrational or unreasonable, should be upheld.[83]

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[79] *Who We Are*, PORTLAND.GOV, https://www.portland.gov/phb/about [https://perma.cc/Z28H-EK4N].

[80] PORTLAND, OR., CODE tit. 23.01.040(B)(2).

[81] *Portland Landlord-Tenant Law: Application and Screening,* PORTLAND HOUS. BUREAU 10 (2020), https://www.portland.gov/sites/default/files/2020-02/phb-rso-brochure-screening-v8-spreads.pdf [https://perma.cc/5J8H-8E9U].

[82] *See*, *e.g.*, Skokie Firefighters Union, Local 3033 v. Ill. Labor Rels. Bd., 74 N.E.3d 1023, 1027 (Ill. App. Ct. 2016) ("[I]nsofar as the case concerns a statute that the agency is charged with administering, we accord the agency's interpretation deference." (citation omitted)); GE Solid State, Inc. v. Dir., Div. of Tax'n, 625 A.2d 468, 472 (N.J. 1993) ("Generally, courts accord substantial deference to the interpretation an agency gives to a statute that the agency is charged with enforcing." (citations omitted)); de la Rosa v. 597 Broadway Dev. Corp., No. 13cv7999, 2015 U.S. Dist. LEXIS 158089, at *62–63 (S.D.N.Y. Aug. 4, 2015) (S.D.N.Y. Aug. 4, 2015) ("As for definitive interpretations of that statute, the New York Commission on Human Rights is the agency responsible for investigation and adjudication of complaints brought under the NYCHRL . . . . As a general matter, interpretations of a statute by the agency charged with its administration are entitled to deference from courts applying New York law." (citations omitted)); Peyton v. Williams, 145 S.E.2d 147, 151 (Va. 1965) ("The elementary rule of statutory interpretation is that the construction accorded a statute by public officials charged with its administration and enforcement is entitled to be given weight by the court.").

[83] *See*, *e.g.*, Hadley v. Ill. Dep't of Corr., 864 N.E.2d 162, 165 (Ill. 2007) ("[A] court will not substitute its own construction of a statutory provision for a reasonable interpretation adopted by the agency charged with the statute's administration." (citations omitted) (internal quotation marks omitted)); *In re* Pub. Serv. Elec. & Gas Co.'s Rate Unbundling,

(b) Relevant Cases

Several cases have examined the imposition of minimum-income requirements upon voucher holders under the SOI laws, with an important decision rendered in New York in the past year. In *Olivierre v. Parkchester Preserv. Co., L.P.*,[84] plaintiff was a 34-year-old homeless woman with two small boys, aged one and five.[85] She had a "CityFHEPS" voucher from the New York City Department of Social Services that would pay the entire market rent directly to the landlord.[86] Defendants rejected her application for an apartment, however, because she failed to meet their minimum-income requirement of at least $62,000 a year.[87] Defendants ("Parkchester") argued "that Parkchester does have legitimate business reasons for asserting a minimum income requirement and that it is also not discriminatory as it uniformly applies to each and every applicant, regardless of protected characteristic or class."[88]

Finding SOI discrimination, the court noted that Parkchester rejected plaintiff's application "based on not meeting Parkchester's minimum income requirements despite the fact that plaintiff had a CityFHEPS voucher that would pay her entire months' rent directly from the City to Parkchester."[89] The court rejected Parkchester's argument that its minimum-income requirement was "uniformly" applied, noting that the requirement was not tied to plaintiff's share of the rent, and that it failed to recognize the value of a full voucher as a guaranteed rent payment:

> [I]t is not clear if the minimum income requirement is actually applied uniformly as plaintiff's calculation, uniquely, has no relation to her share of rent that she would be required to be [sic] pay. The analysis also neglects to value the fact that the subsidy is not just some of plaintiff's income that a tenant could use in various ways, but a direct stream of money to the landlord, earmarked for rent.[90]

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771 A.2d 1163, 1167-68 (N.J. 2001) ("[W]e defer to [t]he agency's interpretation . . . provided it is not plainly unreasonable." (citation omitted) (internal quotation marks omitted)); Samiento v. World Yacht Inc., 10 N.Y.3d 70, 79 (2008); ("The construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld." (citation omitted) (internal quotation marks omitted)); Tucker v. Ford Motor Co., 72 Va. Cir. 420, 433 (Va. Cir. 2007) ("Giving deference as the court must to a reasonable interpretation of a statute by an agency charged with interpreting the statute . . . ." (citation omitted)).

[84] No. 452058 (N.Y. Sup. Ct. 2022).

[85] *Id.* at 1.

[86] *Id.* at 1–2.

[87] *Id.*

[88] *Id.* at 5.

[89] *Id.* at 7.

[90] *Id.* at 8.

The court also cited evidence that it would be impossible for plaintiff and indeed any CityFHEPS beneficiary to earn $62,000 a year and still qualify for the voucher.[91] Hence, "if every landlord enforced minimum income requirements in this fashion, the spirit of source of income discrimination law[s] would be subverted and rendered meaningless."[92]

In two previous lawsuits in New York, plaintiffs had challenged the imposition of minimum-income requirements upon applicants with full vouchers. In both, defendants were forced to abandon those requirements, whether by court-ordered stipulation or lawsuit-induced revision. In *Hoffmaster v. Renaissance Equity Holdings LLC*,[93] plaintiff alleged that defendant refused to rent to him on the ground that he failed to meet their strict income requirements, notwithstanding the fact that he had a HASA voucher that would pay 100% of his rent directly to the landlord.[94] In a court-ordered stipulation of settlement, defendant was required to alter its practices for applicants with a full housing subsidy, and to eliminate its minimum-income requirements for such applicants:

> [A]n applicant seeking to rent an apartment at Flatbush Gardens who receives a public rental housing subsidy or voucher covering 100% of the monthly rental price at which such apartment is offered for lease (each such applicant a "100% Subsidy Applicant") will not be required to establish any minimum income in excess of the housing subsidy or voucher with which the applicant intends to pay the rent.[95]

In *Fair Housing Justice Center, Inc. v. Pelican Management*,[96] "Defendants adopted a policy requiring that all prospective renters in their buildings earn an annual income of at least 43 times their total monthly rent (the 'Old Policy'). This policy applied even if a subsidy paid a portion or the entirety of the rent."[97] In the face of plaintiffs' legal challenge, defendants were forced to change their policy to exempt those with full vouchers from the requirement.[98]

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[91] *Id.* at 8.

[92] The court also noted that "the agencies responsible for adjudicating these types of claims, who are given great deference in the interpretation of their own regulations, have found it to be illegal, and against the purpose of the source of income law, to allow landlords to reject an applicant with a full subsidy based upon minimum income requirements." *Id.* at 7 (citations omitted).

[93] 16 Civ. No. 01934 (E.D.N.Y.).

[94] Complaint, Hoffmaster v. Renaissance Equity Holdings LLC, 16 Civ. No. 01934 ¶ 1–2 (E.D.N.Y. April 20, 2016).

[95] So-ordered Settlement Agreement at ¶ 7, Hoffmaster v. Renaissance Equity Holdings LLC, 16 Civ. 01934 (E.D.N.Y. Oct. 6, 2016).

[96] 18 Civ. No. 1564, 2020 U.S. Dist. LEXIS 131534 (S.D.N.Y. 2020).

[97] *Id.* at *3.

[98] *Id.* at *5. At trial, defendants reiterated that, "[f]or a full subsidy [defendants] no longer require a credit or income requirement," Trial Tr. at 85:23–86:1, Fair Hous. Just. Ctr.,

A final New York case, which predates the SOI law, warrants mention, since it demonstrates the illogic of uniform minimum-income ratios as applied to voucher holders. In *Bronson v. Crestwood Lake Section 1 Holding Corp.*,[99] the court examined defendants' "policy of accepting only those applicants who have an annual income at least equal to three times the annual rent."[100] Defendants argued that "the triple income requirement [was] necessary to insure the payment of rent and adequate protection in the case of a default."[101] Plaintiffs, however, had arranged for all rent to be paid to defendants each month through direct-vendor arrangements.[102] Through these arrangements, the court observed, plaintiffs "have effectively guaranteed their rental payments."[103] Hence, "even if, as a general matter, defendants' Section 8 or triple-income policies reflect prior experience with defaulting tenants, the rationale underlying those policies has little force in the instant case."[104] "Since plaintiffs have sufficiently assured [defendants] of their ability to make the required rental payments, [defendants] need not consider plaintiffs[']. . . ability to 'cover rents and projected needs.'"[105]

Other jurisdictions are in accord. In *Commission on Human Rights & Opportunities v. Sullivan*,[106] the Connecticut complainant "had a section 8 certificate sufficient to pay the rent," but "was informed that her income did not meet the defendant's $38,000 minimum income requirement."[107] Unlike New York's SOI laws, the Connecticut SOI statute expressly provides that the law "shall not prohibit the denial of full and equal accommodations solely on the basis of insufficient income."[108] Nonetheless, the Connecticut Supreme Court struck down defendant's minimum-income requirement because it failed to take into consideration the tenant's portion of the rent, which was zero.[109] A valid defense, the Court ruled, requires "a showing of 'insufficient income' with respect to the potential tenant's own ability to meet his or her personal rent obligation for that part of the rental not covered by section 8 rental assistance payments and to cover other obligations reasonably associated with the tenancy."[110] Hence, "[u]nless defendant makes the requisite showing that the [applicant] had 'insufficient income' to meet the totality

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Inc. v. Goldfarb Props. Inc., 18 Civ. 01564 (S.D.N.Y. Feb. 7, 2022), and admitted that defendants changed their policy because of the lawsuit. *Id.* at 86:2–15.

[99] 724 F. Supp. 148 (S.D.N.Y. 1989).

[100] *Id.* at 151.

[101] *Id.* at 155.

[102] *Id.* at 156.

[103] *Id.* at 156 n.12.

[104] *Id.* at 157.

[105] *Id.* at 158 n.14.

[106] 739 A.2d 238 (Conn. 1999).

[107] *Id.* at 243.

[108] *Id.* at 252 (quoting CONN. GEN. STAT. § 46a-64c(b)(5)).

[109] *Id.* at 254–56. Again, her Section 8 voucher was "sufficient to pay the rent." *Id.* at 243.

[110] *Id.* at 254.

of *their* rental obligations, the commission is entitled to prevail on the issue of liability."[111]

Nine years later, in *Commission on Human Rights & Opportunities v. Sullivan*,[112] complainant Colon applied for an apartment utilizing a Section 8 voucher and reporting an income of $21,000 a year.[113] As the Connecticut Supreme Court noted, under the Section 8 program, Colon would be permitted "to pay personally only a small portion of the total rent, commensurate with [her] income."[114] Ignoring Colon's modest rent contribution, defendants rejected Colon, *inter alia*, for failure to meet defendants' minimum-income requirement of $40,000 per year.[115] Finding SOI discrimination, the Court upheld the lower court's ruling "that the defendants' claim that Colon had insufficient income could not serve as a legitimate basis for the rejection because the formula that the defendants employed in making that determination was based on the total monthly rent for the unit, rather than Colon's personal monthly share of the rent."[116]

Although the Connecticut SOI statute expressly allows landlords to deny applicants based upon insufficient income, the Connecticut Supreme Court explained: "[A] landlord, in deciding not to rent to a prospective tenant, may rely on the statutory exception *only with respect to income requirements that bear a reasonable relationship to a prospective tenant's ability to meet his or her personal rental obligations*, as well as other obligations that arise from the tenancy."[117] "It would be inconsistent with the purpose of the [SOI] provision," the Court noted, "as well as basic principles of statutory construction, to construe the exception so broadly that a landlord may set income requirements that are not reasonably related

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[111] *Id.* at 256 (emphasis added). *See also* Summers v. Tamarack Apts., No. A-2426-06T2, 2008 N.J. Super. Unpub. LEXIS 1312 (2008). In *Summers*, the landlord evicted a tenant because he sought to satisfy his rental arrears utilizing a government "one-shot" deal; the money proffered was, however, insufficient to cover all arears. *Id.* at *2–4. The court ruled that defendant did not evict plaintiff because he sought to pay with public funds, but because those funds were insufficient. *Id.* at *6. Notably, the court observed, "where the assistance will not cover all of the prospective tenant's rent, the landlord has the right to look at the tenant's ability to pay the balance." *Id.* (citing Pasquince v. Brighton Arms Apts., 876 A.2d 834 (N.J. Super. Ct. 2005)). By force of reason, then, where the assistance *will* cover all of the prospective tenant's rent, the landlord does not have the right to look at the tenant's ability to pay the balance. And as this Article makes clear, if a landlord does look at the ability to pay, it must assess only the public assistance recipient's share. *See infra* Section III.

[112] 939 A.2d 541 (Conn. 2008).

[113] *Id.* at 545.

[114] *Id.* at 547.

[115] *Id.* at 546.

[116] *Id.* at 556; *accord id.* at 557 (Defendants' argument "that Colon could not meet their income requirements, was not a legitimate, nondiscriminatory reason because the defendants' income requirements were unrelated to Colon's personal share of the periodic rent.").

[117] *Id.* at 551 (emphasis added).

to the personal periodic rental obligations of a prospective tenant who is a section 8 participant."[118]

In *Fulk v. Lee*,[119] although "[p]laintiff had Section 8 benefits that would have paid the full amount of the rent,"[120] defendant denied her application on the ground that she had no employment and thus "had 'insufficient income' within the meaning of the [Connecticut statutory exemption]."[121] Rejecting this ground, the court observed that defendants failed to "consider the Plaintiff's income from welfare and her ability to meet the expenses of her tenancy."[122] The court reiterated that rejections based upon lack of income or employment, despite an applicant's "ability to meet the expenses of her tenancy," constitute SOI discrimination.[123] The court explained:

> Here the Defendants admit that the Plaintiff was refused the rental because she had no employment. However, she had Section 8 benefits sufficient to cover the rent as well as welfare assistance. The purpose of Section 8, as the [Connecticut] Supreme Court noted, is to aid low-income families in obtaining decent housing, thus it is likely that recipients have no or little income from employment. Yet the statute provides that the defendants could not refuse to rent to the plaintiff because of her source of income. By rejecting her on the basis that she had no employment, the defendants accomplished indirectly what they could not do directly. To reject the Plaintiff on this basis alone violates the prohibition of the statute that prohibits a refusal to rent based on "lawful source of income."[124]

In *Moran v. Tower Management Services*,[125] the complainant sought to apply for an apartment utilizing a Section 8 voucher.[126] He received $965 per month in Supplemental Security Income ("SSI") each month, and pursuant to Section 8 rules, he would have been required to pay only 30% of this amount per month toward rent; the Section 8 program would pay all of the remaining rent each month. Respondent nonetheless informed complainant that he must meet respondent's minimum-income requirement of $33,000 per year.[127] Upon remand from the New Jersey Appellate

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[118] *Id.* at 551–52; *accord id.* at 552 (landlord invoking insufficient income exception "may consider only whether a prospective tenant receiving section 8 assistance has sufficient income to meet his or her tenancy obligations that are not otherwise covered under section 8").

[119] CV970063572, 2002 Conn. Super. LEXIS 499 (Conn. Super. Ct. Feb. 7, 2002).

[120] *Id.* at *2.

[121] *Id.* at *7.

[122] *Id.*

[123] *Id.*

[124] *Id.* at *6–7.

[125] No. A-2616-16T4, 2018 WL 6272934 (N.J. Super. Ct. App. Div. Dec. 3, 2018).

[126] Finding of Probable Cause, *supra* note 70, at 1.

[127] *Id.* at 2.

Division, the New Jersey Division on Civil Rights found probable cause of SOI discrimination and ordered that the case proceed to trial.[128]

Respondent, the Division ruled, "has not demonstrated that its minimum income requirement of $33,000 per year for a one-bedroom apartment serves a legitimate non-discriminatory business interest as applied to applicants with Section 8 housing vouchers, where the applicant pays only a small portion of the monthly rent."[129] The Division rejected imposition of the requirement because it bore no relationship to the applicant's ability to pay the monthly rent:

> [T]he application of the minimum income requirement in this way still worked to exclude an applicant who, by virtue of renting the apartment with a Section 8 voucher, the federal government had certified was able to pay, because he did not meet a requirement logically applied only to those responsible for the entire rent.
>
> Respondent's minimum income requirement had no relationship to what Complainant would be required to pay in monthly rent, and no relationship to Complainant's ability to pay that portion of the rent. Respondent gave no other reason for application of the policy to Complainant or other Section 8 recipients. Thus, even when uniformly applied to all prospective tenants, minimum income policies may unreasonably exclude voucher holders like Complainant, and consequently many low-income and disabled persons who rely on rental assistance programs.[130]

Finally, it is interesting to note that in Canada, tribunals have repeatedly rejected the very validity and usefulness of minimum-income requirements as applied to voucher holders, finding these requirements discriminatory. In *Kearney v. Bramalea Ltd. (No. 2)*,[131] the Ontario Board of Inquiry ("Board") concluded that the use of minimum-income criteria violates the Ontario Human Rights Code. Respondents in that case argued that the use of "income criteria is bona fide and that without the ability to screen tenants in this manner and thereby limit their risk,

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[128] *Id.* at 5–6.

[129] *Id.* at 4; *accord id.* at 5 ("Respondent did not even attempt to prove that any legitimate, non-discriminatory business reason required it to apply its $33,000/year minimum income requirement to someone who would have been responsible for a maximum of $386 of the $995 monthly rent.").

[130] *Id.* at 5. Respondent ultimately settled this matter, agreeing to pay Mr. Moran $30,000 in damages. *See* Ashley Balcerzak, *NJ Real Estate Company Settles for 30K with Man Wanting to Use Section 8 Vouchers for Rent,* NORTHJERSEY.COM (Nov. 13, 2020), https://www.northjersey.com/story/news/2020/11/13/tower-management-nj-real-estate-pay-30-k-settle-discrimination-case/6280278002/ [https://perma.cc/4ZYX-XWQW]. *See also* Pasquince v. Brighton Arms Apts., 876 A.2d 834, 837 (N.J. Super. Ct. 2005) ("Brighton Arms exempts section 8 applicants from its minimum income requirements because it may not discriminate against such applicants based on the source of their income.").

[131] 1998 CanLII 29852 (Can. Ont. H.R.T.).

landlords would suffer undue business hardship."[132] The Board, however, credited expert testimony "that rent-to-income ratios, presently used by landlords, are not a valid criterion for assessing a person's ability or willingness to pay rent, nor that it predicts default."[133] "We are persuaded," the Board observed, "that the rule is based on little more than assumptions about what average households tend to spend and/or beliefs about what they ought to spend on housing."[134] Use of income criteria was not "reasonable,"[135] since respondents' evidence "fail[ed] to show a connection between a rent-to-income ratio and the risk of default."[136] The Board noted, moreover, that the income criteria "excluded all recipients of social assistance from [the housing in question]."[137] "[S]ince the rent-to-income ratio has no predictive value as to whether a tenant is likely to default in future," the court Board concluded, "stopping the use of such a ratio will not cause hardship."[138]

Two years later, in *Birchall v Guardian Properties Ltd.*,[139] the British Columbia Human Rights Tribunal ("Tribunal") similarly found respondent's minimum-income requirement discriminatory:

> As in *Kearney,* the respondent in the case before me has provided no evidence that the use of rent-to-income ratios and minimum income criteria are reliable predictors of either default or ability to pay. Neither has the respondent in this case shown that being precluded from using these criteria would cause it undue hardship.[140]

The Tribunal ordered respondent to refrain from imposing the rent-to-income criteria and to pay the complainant compensatory damages and expenses.[141] Voucher programs already determine voucher holders' ability to pay rent in calculating the amount of rental assistance provided and in limiting the voucher holders' monthly rent share.[142] The imposition of additional income requirements for voucher holders is both an unnecessary and unjustified form of SOI discrimination, as several courts and tribunals have determined.

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[132] *Id.* at ¶ 5.
[133] *Id.* at ¶ 82.
[134] *Id.* at ¶ 147.
[135] *Id.* at ¶ 154.
[136] *Id.* at ¶ 159.
[137] *Id.* at ¶ 116.
[138] *Id.* at ¶ 174.
[139] [2000] 38 C.H.R.R. 36 (Can. B.C. H.R.T.).
[140] *Id.* at ¶ 34.
[141] *Id.* at ¶ 53.
[142] *See* discussion *infra* notes 212–14 and accompanying text.

B. Minimum Credit Requirements—Statutes and Authorities

1. Statutory Scheme

Most SOI statutes do not specifically address the question whether a landlord may impose minimum credit ratios, and if so, in what manner.[143] Those that do take a variety of approaches. Washington, D.C.'s SOI statute expressly prohibits discrimination against voucher holders based upon "[a]ny credit issues that arose during a period in which the prospective tenant did not have an income-based housing subsidy if the housing provider could reasonably have known the date of receipt [of the voucher]."[144] Colorado's statute allows for credit checks "provided that the landlord checks the credit of every prospective tenant."[145] Delaware allows for consideration of "the credit rating of a renter or buyer, so long as . . . the credit requirements, are applied in a commercially reasonable manner and without regard to source of income."[146] And Maryland permits landlords to verify "in a commercially reasonable and nondiscriminatory manner the . . . creditworthiness of the potential buyer or renter."[147]

2. Governmental Agency Interpretations and Case Law

(a) Agency Interpretations

The NYCHRC expressly addresses the question whether a landlord may reject a voucher holder based upon credit, determining that it is impermissible to do so for those with a full voucher and requiring a flexible, case-by-case assessment for those with a rent share:

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[143] *See*, *e.g.*, 775 ILL. COMP. STAT. § 5/3-102; ME. REV. STAT. ANN. tit. 5 § 4581-A(4); N.J. STAT. ANN. § 10:5-12(g)(4); N.Y. EXEC. LAW § 296(5); OKLA. STAT. tit. 25 § 25-1452; UTAH CODE ANN. § 57-21-5; MIAMI-DADE CNTY., FLA., CODE OF ORDINANCES ch.11A Art. II § 11A-12; ANN ARBOR, MICH., CITY CODE tit. IX ch. 112 § 9:152.

[144] D.C. CODE ANN. § 2-1402.21(g)(C).

[145] COLO. REV. STAT. ANN. § 24-34-502(1.5)(b). Note that in Colorado, "[i]f a landlord uses rental history or credit history as criteria in consideration of an application, the landlord shall not consider any rental history or credit history beyond seven years immediately preceding the date of the application." COLO. REV. STAT. ANN. § 38-12-904(1)(a).

[146] DEL. CODE ANN. tit. 29 § 4607(h).

[147] MD. CODE ANN. § 20-704(d). *See*, *e.g.*, KING CNTY., WASH., CODE § 12.20.130(C) ("Nothing in this chapter prohibits any party to a real estate transaction or real estate-related transaction from considering the capacity to pay and credit history of any individual applicant."); SUN PRAIRIE, WIS., CODE OF ORDINANCES § 9.20.010 ("This policy does not preclude an owner from taking reasonable precautions and implementing sound business practice by screening tenants. This screening may include requiring credit histories and credit checks . . . .").

> Q5. May I reject an applicant with a housing voucher based on credit history or score?
>
> A5. If the voucher/subsidy covers 100% of the rent, you may not reject an applicant based on credit history or score. If the applicants pay a portion of the rent, you may make a credit inquiry. Requiring a specific credit score, however, is evidence of discrimination. Each application should be considered on a case-by-case basis. Prior to rejecting an applicant based on credit, the applicant should be provided an opportunity to demonstrate ability to timely pay their portion of the rent. To protect yourself under the [SOI] Law and comply with federal law when making a decision based on a credit report, provide the applicant a written explanation of your analysis.[148]

The NYSDHR similarly advises:

> Can a housing provider deny housing based on the results of a credit history report?
>
> Housing applicants must be individually considered on a case-by-case basis. A housing provider cannot have a facially neutral income or wealth requirement that is equally applied but has the effect of excluding populations with rental subsidies.
>
> Credit scores or credit history reports may not be used in a way that frustrates the purpose of the [SOI] Law. Credit scores and credit history reports may not be valid indicators of whether a person will pay the rent. For example, where the vouchering agency pays 100% of the rent, consideration of negative credit history would be unreasonable.[149]

In Portland, Oregon, finally, landlords may apply either predefined "Low-Barrier" screening criteria or their own screening criteria ("Landlord Choice").[150] If they elect the former, they cannot reject an applicant for the following aspects of their credit history:

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[148] *Best Practices*, *supra* note 65, at 2; *accord* N.Y.C. COMM'N ON HUM. RTS., *supra* note 3, at 2 ("What does lawful source of income discrimination look like? . . . A broker or landlord says you don't meet a minimum income requirement, even though the rent falls within the voucher payment standard.").

[149] N.Y. GUIDANCE, *supra* note 68, at 5.

[150] PORTLAND HOUS. BUREAU, *supra* note 81, at 14–16.

> 1. A credit score [that is not] at least 500 or higher
>
> 2. Insufficient credit history, unless an applicant in bad faith withholds credit history information that might otherwise form the basis for a denial
>
> 3. Negative information provided by a consumer credit reporting agency indicating past-due unpaid obligations in amounts less than $1,000
>
> 4. A balance owed for prior rental property damage in an amount less than $500
>
> 5. A bankruptcy, filed by the applicant, that has been discharged
>
> 6. A Chapter 13 Bankruptcy filed by the applicant, and under active repayment
>
> 7. Medical or education/vocational training debt.[151]

If they opt for the latter (their own screening criteria), they must conduct an individual assessment, considering "the context around negative application components," and they must consider all supplemental evidence that the applicant provides "to explain, justify, or negate the relevance of potentially negative information revealed through screening."[152]

(b) Relevant Cases

In New Jersey, a pair of cases have examined the application of minimum-credit requirements to voucher holders under the SOI law. In *T.K. v. Landmark W.*,[153] defendant denied plaintiff's rental application based upon plaintiff's credit rating, along with "insufficient income," although defendant dropped the latter ground.[154] At the time of the decision, the New Jersey SOI law expressly allowed for an examination of an applicant's creditworthiness.[155] Plaintiff, however, had a full housing voucher from Section 8: "Section 8 would cover the full rental payment for a one-bedroom apartment at Landmark West and would even issue a $12 check to

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[151] *Id*. at 14.

[152] *Id.* at 16.

[153] 802 A.2d 609 (N.J. Super. Ct. 2001), *aff'd*, 802 A.2d 527 (N.J. Super. Ct. App. Div. 2002).

[154] *Id.* at 611, 614.

[155] *See* N.J. STAT. ANN. § 2A:42-100 (repealed) ("Nothing contained in this section shall limit the ability . . . to refuse to rent or lease any house or apartment because of the creditworthiness of the person or persons seeking to rent a house or apartment."). This statute was repealed a year later and replaced with a SOI statute with no such provision. *Pasquince v. Brighton Arms Apts.*, 876 A.2d 834, 838 (N.J. Super. Ct. 2005) ("This statute was repealed by L. 2002, c. 82, § 7 (effective Sept. 5, 2002)."). *See* N.J. STAT. ANN. § 10:5-12(g)(4).

be used toward utilities."[156] The court therefore rejected defendant Landmark West's reliance upon the "creditworthiness" exception in the New Jersey source of income law:

> Defendant acknowledged that plaintiff's rent will be paid in full and plaintiff testified that she can pay the security deposit. Thus, the defendant has not established any rational relationship between the plaintiff's credit report and Landmark West's legitimate concern that plaintiff has the means to pay the rent. Under these circumstances, Landmark West has failed to establish that plaintiff is not creditworthy.[157]

Accordingly, and "[g]iven the landlord's inconsistent and unsubstantiated reasons for not accepting the plaintiff as a tenant, it is not unreasonable to conclude that the plaintiff was arbitrarily and unfairly rejected because of her dependence upon governmental assistance. Such a result is untenable and violates the letter and spirit of [the New Jersey SOI law]."[158]

Although reaching the correct result, the reasoning in *T.K.* is flawed, as the subsequent appellate decision makes clear. The court should have simply declared that it is irrational and thus illegal to consider credit for an applicant with a full voucher (although the decision justifies that conclusion).[159] The court, however, also discussed defendant's inconsistent decision-making process, noting that defendant "failed to utilize any formula or uniform standards when evaluating plaintiff's credit worthiness," and that "the decision-making process was somewhat subjective."[160] This analysis was unnecessary and irrelevant; even with a consistent and objective decision-making process, there is no reasonable justification for rejecting an applicant with a full voucher based upon credit.[161]

In affirming the lower court's decision, the appellate decision compounded this error, noting the lower court's finding that the defendant may have based its decision not on creditworthiness, but other prohibited factors:

> Judge Graves found that "there was no doubt" that defendant rejected plaintiff's application because of her "economic status, including her unemployment, lack of sufficient income and her participation in the Section 8 program," rather than her lack of creditworthiness. As such, he concluded that plaintiff's credit problems, which were disputed, were used

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[156] T.K. v. Landmark W., 802 A.2d 609, 614 (N.J. Super. Ct. 2001).

[157] *Id.*

[158] *Id.* at 615.

[159] The New Jersey Civil Rights Division would later strike down an analogous minimum-income requirement, finding that defendant's requirement—even as applied to a voucher holder with a rent share—"had no relationship to what [plaintiff] would be required to pay in monthly rent, and no relationship to [plaintiff's] ability to pay that portion of the rent." Finding of Probable Cause, *supra* note 70, at 5.

[160] *T.K.*, 802 A.2d at 613.

[161] *See* discussion *infra* Section III.B.1.

> as a pretext by defendant for denying plaintiff's application and that the testimony presented by defendant lacked credibility. It would be improper for us to engage in any independent assessment of credibility.[162]

This is a muddled opinion. On the one hand, the lower court indeed posited that since the plaintiff had a full subsidy, the alleged concern with creditworthiness was a pretext for source of income discrimination. On the other hand, the appellate court need not have gone any further than to declare that it is unreasonable to reject an applicant with a full subsidy based upon creditworthiness. Indeed, as the lower court explained, given the full voucher, the defendant could not establish "any rational relationship between the plaintiff's credit report and [defendant's] legitimate concern that plaintiff has the means to pay the rent."[163]

In *Pasquince v. Brighton Arms Apartments*,[164] plaintiff's Section 8 voucher covered $774 of the $915 monthly rent; plaintiff was responsible for the remaining $141 per month, to be paid out of his $556 in disability income.[165] Defendant denied plaintiff's application "based upon his poor credit history."[166] Ruling for defendant, the court observed that "it is well established that creditworthiness is a legitimate, non-discriminatory criteria [sic] which landlords are permitted to consider when evaluating prospective tenants, including recipients of Section 8 housing assistance."[167] The court was not deterred by the fact that this principle was established (a) under the earlier SOI law, which expressly permitted landlords to assess "creditworthiness," a law replaced in September 2002 with an SOI law that eliminated this exemption,[168] and (b), under federal law, which does not prohibit SOI discrimination.[169] The court observed:

> The prospective tenant is still responsible for the payment of some portion of the rent, and, if the applicant has a history of not paying his or her financial obligations, it is logical and reasonable for a landlord to conclude that the applicant might avoid the rent obligation, no matter how small the amount. Moreover, the rent subsidy could be terminated, in which case the tenant would be responsible for the entire rent obligation.[170]

As to the first justification, the court failed to acknowledge several important limiting factors, such as distinguishing between credit issues that arose before the

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[162] *T.K.*, 802 A.2d at 528 (citation omitted).
[163] *Id*. at 614.
[164] 876 A.2d 834 (N.J. Super. Ct. 2005).
[165] *Id.* at 836–37.
[166] *Id.* at 837.
[167] *Id.* at 838–39.
[168] *See id.* at 839 ("The legislative history does not suggest that there was any intent by the Legislature to eliminate creditworthiness as an appropriate selection criteria [*sic*] for Section 8 tenants."); *see also* discussion *supra* note 156 and accompanying text.
[169] *See id.* at 839–40 (examining federal precedents).
[170] *Id.* at 841.

applicant secured an income-based subsidy, a distinction that Washington, D.C.'s SOI statute, for example, expressly requires.[171]

Meanwhile, the latter justification is entirely specious and, in fact, discriminatory. Employed applicants could (arguably even more easily) lose their jobs after securing approval and moving in. Indeed, ironically, a survey of rental arrears accrued during the COVID-19 pandemic "found that tenants with vouchers owe less back rent, and landlords have had positive experiences with voucher holders. These results suggest vouchers have helped tenants and landlords weather the pandemic's financial effects."[172] There is thus no principled basis for a landlord to single out those with a public source of income and to reject them based upon speculative future contingencies. Landlords do not subject employed applicants to credit checks of individuals not currently responsible for rent under the pretext that those individuals could later become responsible for paying the rent if the applicant lost her job. Singling out voucher holders for this procedure constitutes discriminatory disparate treatment.

Finally, the court recognized a distinction between those with a rent share and those with a full voucher: "[U]nlike the rental applicant in *T.K.*, plaintiff here would be responsible for a portion of his rent obligation."[173] By force of reason, then, where the applicant is not responsible for a portion of the rent, defendant's credit check would not be justified.

In the aforementioned *Short v. Manhattan Apartments*,[174] defendant Abba required HASA clients to "pass a credit check" before moving forward in the application process.[175] Plaintiff Short, however, had a full housing subsidy from HASA.[176] Ruling that defendant violated the SOI law, the court observed:

> Abba also failed to offer a non-discriminatory explanation as to why it was necessary for HASA clients to complete an application and pass a credit check before viewing an apartment. . . . [I]t remains unclear why an early credit check was necessary for HASA clients when their rents were guaranteed by the city.[177]

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[171] D.C. CODE ANN. § 2-1402.21(g)(C). *See* discussion *supra* note 145 and accompanying text.

[172] Jung Hyun Choi & Laurie Goodman, *Housing Vouchers Have Helped Tenants and Landlords Weather the Pandemic,* URBAN INST. (Mar. 23, 2021), https://www.urban.org/urban-wire/housing-vouchers-have-helped-tenants-and-landlords-weather-pandemic [https://perma.cc/VG82-ZD6C].

[173] The court also noted that the defendant had other Section 8 tenants, and a written set of standards regarding credit history, warning that "[t]he situation might be different if there was evidence that [defendant] deviated from its creditworthiness criteria for non-Section 8 applicants." *Pasquince*, 876 A.2d at 842.

[174] *See supra* notes 4–10.

[175] 916 F. Supp. 2d 375, 400 (S.D.N.Y. 2012).

[176] *Id.* at 382.

[177] *Id.* at 401.

In *Hoffmaster v. Renaissance Equity Holdings LLC*, discussed *supra*,[178] defendant was required in a court-ordered stipulation of settlement to eliminate its credit requirements for applicants with a full housing subsidy: "Defendant will not deny the application of any 100% Subsidy Applicant on the basis of failure to satisfy credit criteria for rental applications at Flatbush Gardens."[179] Likewise, in *Fair Housing Justice Center, Inc. v. Pelican Management*, discussed *supra*,[180] defendant was forced to abandon its credit requirements for those with full vouchers in the face of a legal challenge.[181]

Finally, in *Bronson v. Crestwood Lake Section 1 Holding Corp.*, discussed *supra*,[182] defendants argued, among other things, that "credit history" was among the "'legitimate, objective' criteria" upon which they were entitled to rely in evaluating plaintiffs' applications.[183] Because plaintiffs had "effectively guaranteed their rental payments,"[184] however, the court found that defendants' "concerns with tenant creditworthiness" were not "legitimate justifications for denying plaintiffs tenancies at Crestwood."[185] "Since plaintiffs have sufficiently assured [defendants] of their ability to make the required rental payments," the court explained, "[defendants] need not consider plaintiffs' . . . 'credit history' . . . ."[186]

III. ASSESSING SECOND-GENERATION DISCRIMINATION UNDER THE RELEVANT STATUTES AND AUTHORITIES

As the discussion in Part II, *supra*, indicates, there are a number of relevant agency interpretations and decisions to help guide courts and practitioners. Given the ubiquity of second-generation SOI discrimination, however, this number is still alarmingly small, a testament to both the relative novelty of SOI laws in many jurisdictions and, more troublingly, the lack of sufficient enforcement.[187] In addition,

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[178] *See* discussion *supra* notes 94–96 and accompanying text.

[179] So-ordered Settlement Agreement at ¶¶ 7–8, Hoffmaster v. Renaissance Equity Holdings LLC, 16 Civ. 01934 (E.D.N.Y. Oct. 6, 2016).

[180] *See* discussion *supra* notes 96–98 and accompanying text.

[181] *See supra* note 98.

[182] *See* discussion *supra* notes 99–105 and accompanying text.

[183] Bronson v. Crestwood Lake Section 1 Holding Corp., 724 F. Supp. 148, 158 n.14 (S.D.N.Y. 1989).

[184] *Id.* at 157 n.12.

[185] *Id.* at 157.

[186] *Id.* at 158 n.14.

[187] *See*, *e.g.*, Beth Musgrave, *Is It Time for Lexington to Enact a 'Tenants' Bill of Rights'? Council Weighing Some Ideas*, LEXINGTON HERALD LEADER (Oct. 14, 2022) ("[T]he Louisville Metro Human Rights Commission, which is tasked with investigating discrimination claims, has very little funding to investigate source of income complaints, housing rights groups have said."); Brand, *supra* note 38 ("[T]he New York City agencies tasked with cracking down on source of income (SOI) discrimination are being forced to do more with less after hiring freezes, resignations and budget cuts whittled down their already overburdened enforcement units."); BELL ET AL., *supra* note 47, at 9 ("Among the reasons

few if any of the relevant decisions contain a comprehensive analysis of the issues at play—e.g., the multiple and often independently dispositive grounds upon which these requirements violate the SOI laws—and none of them draws on the full and growing menu of authorities. The following discussion seeks to provide that comprehensive analysis.

A. Minimum-Income Requirements

1. Full Vouchers

Given that those with a full housing voucher are not responsible for paying *any* of the rent, their income is irrelevant. If anything, the income of the entity paying the full rent—the government—is the only (arguably) relevant income.[188] As the Cook County Human Rights Commission opined, full voucher holders "in effect, have an infinite rent-to-income ratio when compared to that of a market applicant."[189] Imposing minimum-income requirements on these applicants is irrational, unreasonable, and in bad faith, and it plainly violates the SOI laws, as every court and commission to address this issue has concluded.[190]

It also violates the express statutory provisions that require landlords to apply any income requirements only to the voucher holder's share of the rent.[191] Since those with full vouchers have no share, income requirements cannot serve as a basis to disqualify them. For the same reason, subjecting those with full vouchers to income requirements violates statutory provisions that provide that any income verification must be conducted reasonably or in good faith.[192] This is particularly the case given that these exceptions to the SOI statutes must be narrowly construed in favor of the plaintiff.[193]

In addition, imposition of these requirements upon full voucher holders violates express statutory provisions that prohibit discrimination in rental terms or

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that may dampen SOI laws' potential impact, interviewees mentioned . . . lack of enforcement of the law . . . ."); Tighe et al., *supra* note 47, at 8 ("Even in areas where there are SOI antidiscrimination laws, there is concern that nonexistent or unequal policy enforcement tempers potential positive outcomes."); *Without Enforcement Teeth*, *supra* note 54.

[188] *See supra* notes 131–41 and accompanying text (discussing Canadian cases that question the very validity of income ratios for voucher holders).

[189] Letter from Ranjit Hakim s*upra* note 77, at 2 n.1. Use of the term "market applicant" here is misleading, since, in every case, voucher holders, too, apply for and pay the full market rent.

[190] *See* discussion *supra* Section II.A.2.

[191] *See* discussion *supra* note 61 and accompanying text.

[192] *See* discussion *supra* note 60 and accompanying text.

[193] *See* discussion *infra* notes 200–02 and accompanying text.

conditions:[194] other applicants are required to meet a ratio of income merely to the portion of rent for which they are responsible, while voucher holders with full vouchers must meet the ratio for the entire rent, none of which they are responsible to pay. Hence, where landlords impose even uniform minimum-income requirements upon those with full vouchers, it may fairly be argued that they are *directly* violating the law by imposing a term or condition *not imposed upon others*.[195] In such cases, the application of a minimum-income requirement upon applicants with full vouchers constitutes direct evidence of discrimination, i.e., blatant violation of SOI laws expressly defining SOI discrimination as the imposition of discriminatory terms and conditions. Accordingly, the *McDonnell Douglas*[196] burden-shifting test, which allows a defendant to proffer a legitimate, nondiscriminatory justification for its actions in cases "where circumstantial evidence is the only proof of discrimination,"[197] should not apply.[198] Even if the

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[194] *See*, *e.g.*, COLO. REV. STAT. § 24-34-502(1)(m) (2023) (providing that it is an unfair and unlawful housing practice "to discriminate in the terms, conditions, or privileges pertaining to the rental or lease of any housing . . . because of a person's source of income"); 775 ILL. COMP. STAT. § 5/3-102(B) (providing that it is a civil rights violation to "[a]lter the terms, conditions or privileges of a real estate transaction" based upon SOI); N.Y. EXEC. LAW § 296(5)(a)(2) (providing that it is unlawful "[t]o discriminate against any person because of . . . lawful source of income . . . in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or in the furnishing of facilities or services in connection therewith"); ORE. REV. STAT. § 659A.421(2)(c) (2021) (providing that it is unlawful to "[m]ake any distinction, discrimination or restriction . . . in the price, terms, conditions or privileges relating to the sale, rental, lease or occupancy of real property"); UTAH CODE ANN. § 57-21-5(1)(b) (providing that it is a discriminatory housing practice to "[d]iscriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling"); VA. CODE ANN. § 36-96.3(A)(2) (providing that it is a discriminatory housing practice to "discriminate against any person in the terms, conditions, or privileges of the sale or rental of any dwelling"); DAYTONA BEACH, FLA., CODE OF ORDINANCES § 54-28(a)(2) (2021) (providing that it is unlawful to "[d]iscriminate against any person in the terms, conditions, or privileges of the rental or lease of a residential dwelling unit located within the city").

[195] *See* Olivierre v. Parkchester Preservation Co., L.P., 2022 WL 18456529, at *4 (Sup. Ct. N.Y. Cnty. July 29, 2022) ("[I]t is not clear if the minimum income requirement is actually applied uniformly as [defendants'] calculation, uniquely, has no relation to her share of rent that she would be required to be pay.").

[196] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[197] *Id.* at 802–03 (citations omitted) (internal quotation marks omitted); E.E.O.C. v. Alton Packaging Corp., 901 F.2d 920, 924 (1990) (discussing the application of the *McDonnell Douglas* burden-shifting test) (citations omitted) (internal quotation marks omitted).

[198] *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) ("[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination."); *accord* Swierkiewicz v. Sorema, 534 U.S. 506, 511 (2002). This doctrine has repeatedly been applied to SOI cases in particular. *See* Short v. Manhattan Apts., Inc., 916 F. Supp. 2d 375, 399 (S.D.N.Y. 2012) ("Since Plaintiffs have proffered direct evidence

court were to apply the test, moreover, there can be no legitimate, nondiscriminatory justification for imposing minimum-income requirements upon full voucher holders.[199] Hence, even under broader SOI laws, this disparate treatment of voucher holders is unjustified and thus discriminatory.

Finally, upholding these minimum-income requirements for full voucher holders would violate three fundamental tenets of statutory construction. First, such a finding would violate statutory and judicial directives that SOI laws, which are remedial laws, must be broadly and liberally construed in favor of discrimination plaintiffs. The New York City SOI law, for example, must be "construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof,"[200] and, as New York's highest court has explained, "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible."[201] Similar rules of construction apply throughout the United States, and in every state with a SOI law.[202] It would require the narrowest and most illiberal reading to conclude

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of discrimination on the part of [defendants], the Court need not consider [defendant's] argument that it had a legitimate business justification for its practices."); Comm'n on Hum. Rts. and Opportunities v. Forvil, 25 A.3d 632, 643 (2011) (rejecting defendants' proffered "nondiscriminatory justification" in direct evidence case as "irrelevant to the question of whether the defendants engaged in impermissible discrimination" under the SOI law); Feemster v. BSA Ltd. P'ship, 548 F.3d 1063, 1070 (D.C. Cir. 2008) (where a policy is "discriminatory on its face, 'the defendant's motive is irrelevant'" (citations omitted)).

[199] *See, e.g.*, Comm'n on Hum. Rts. & Opportunities v. Sullivan, 939 A.2d 541, 557 (Conn. 2008) (Defendants' argument "that Colon could not meet their income requirements, was not a legitimate, nondiscriminatory reason because the defendants' income requirements were unrelated to Colon's personal share of the periodic rent."); Finding of Probable Cause, *supra* note 70, at 4 ("[Respondent] has not demonstrated that its minimum income requirement of $33,000 per year for a one-bedroom apartment serves a legitimate non-discriminatory business interest as applied to applicants with Section 8 housing vouchers, where the applicant pays only a small portion of the monthly rent."); Bronson v. Crestwood Lake Section 1 Holding Corp., 724 F. Supp. 148, 157 (S.D.N.Y. 1989) (noting that where full payment of rent is ensured, "the rationale underlying those policies has little force"); N.Y. GUIDANCE, *supra* note 68, at 5 ("[A] requirement of a certain level of income based on a formula tied to the rental cost, even though required of other tenants, would be unreasonable if applied to a tenant who has 70% to 100% of the rent paid by the vouchering agency."); VIRGINIA GUIDANCE, *supra* note 28, at 4 ("Housing providers who add the voucher payment to a tenant's other income and then use that total to determine if criteria are met improperly treat the voucher portion.").

[200] N.Y. CITY ADMIN. CODE § 8-130.

[201] Albunio v. City of New York, 947 N.E.2d 135, 138 (N.Y. 2011).

[202] *See*, *e.g.*, Sisemore v. Master Financial, Inc., 60 Cal. Rptr. 3d 719, 742–43 (Cal. Ct. App. 2007) (rejecting narrow interpretation of source of income law, *inter alia*, because the law "is to be liberally construed" and narrow construction "would not be in accord with common sense and justice" (citations omitted) (internal quotation marks omitted)); Nieto v. Clark's Mkt., Inc., 488 P.3d 1140, 1147 (Colo. 2021) ("As a remedial statute, it must be liberally construed to carry out its purpose." (citations omitted) (internal quotation marks omitted)); Comm'n on Hum. Rts. & Opportunities v. Sullivan Assocs., 739 A.2d 238, 250

(Conn. 1999) ("The principles of statutory construction direct us to construe remedial statutes liberally in order to effectuate the legislature's intent." (citations omitted) (internal quotation marks omitted)); Stop & Shop Cos., Inc. v. Gonzales, 619 A.2d 896, 898 (Del. 1993) ("Since the statute may be deemed remedial legislation designed to benefit claimants, we are required to accord to the statute a broad construction to accommodate the legislative will." (citation omitted)); S. N. Nielsen Co. v. Pub. Bldg. Comm'n of Chi., 410 N.E.2d 40, 44 (Ill. 1980) ("[R]emedial legislation should be construed liberally to effectuate its purposes."); Dir. of Bureau of Lab. Standards v. Cormier, 527 A.2d 1297, 1300 (Me. 1987) ("Remedial statutes should be liberally construed to further the beneficent purposes for which they are enacted"); Andrews & Lawrence Pro. Servs., LLC v. Mills, 223 A.3d 947, 968 (Md. 2020) ("Once we have determined that a statute is remedial in nature, it must be liberally construed, in order to effectuate its broad remedial purpose." (citations omitted) (internal quotation marks omitted)); Commonwealth v. Williams, 119 N.E.3d 1171, 1180 (Mass. 2019) ("[O]ur reading also aligns with the oft-stated rule that remedial statutes are to be interpreted broadly." (citation omitted)); Hansen v. Robert Half Int'l, Inc., 813 N.W.2d 906, 916 (Minn. 2012) ("Generally, statutes which are remedial in nature are entitled to a liberal construction, in favor of the remedy provided by law, or in favor of those entitled to the benefits of the statute." (citation omitted) (internal quotation marks omitted)); Smith v. Millville Rescue Squad, 139 A.3d 1, 10–11 (N.J. 2016) ("When confronted with any interpretive question, we must recognize that the [Law Against Discrimination] is remedial legislation intended to eradicate the cancer of discrimination in our society, and should therefore be liberally construed in order to advance its beneficial purposes." (citations omitted) (internal quotation marks omitted)); N.Y. EXEC. LAW § 300 ("The provisions of this article shall be construed liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed."); Stenehjem *ex rel*. State v. Crosslands, Inc., 782 N.W.2d 632, 637 (N.D. 2010) ("A remedial statute must be construed liberally with a view to effecting its objects, promoting justice, and effectuating the public policy articulated therein." (citation omitted)); J.M.L. v. State, 433 P.3d 726, 727 (Okla. 2018) ("It has long been recognized that remedial statutes should be construed liberally so as to afford all the relief within the power of the court which the legislature intended to grant." (citation omitted)); Hinton v. Hill, 149 P.3d 1205, 1209 (Or. 2006) ("[T]hese phrases should be construed broadly to achieve the remedial purpose of the statutes."); Ricci v. R.I. Com. Corp., 276 A.3d 903, 906 (R.I. 2022) ("[I]t is important to be mindful of the principle that remedial statutes are to be liberally interpreted." (citation omitted)); Olsen v. Chase, 270 P.3d 538, 542 (Utah Ct. App. 2011) ("[W]e broadly construe the statute to effect its remedial purpose." (citation omitted) (internal quotation marks omitted)); Forrett v. Stone, 256 A.3d 585, 590 (Vt. 2021) (noting that a remedial statute "must be liberally construed to suppress the evil and advance the remedy intended by the Legislature" (citation omitted) (internal quotation marks omitted)); Neal v. Fairfax Cnty. Police Dep't, 812 S.E.2d 444, 448–49 (Va. 2018) ("Remedial statutes are to be liberally construed so as to suppress the mischief and advance the remedy in accordance with the legislature's intended purpose." (citation omitted) (internal quotation marks omitted)); Faciszewski v. Brown, 386 P.3d 711, 718 (Wash. 2016) ("[W]e construe remedial statutes liberally in accordance with the legislative purpose behind them." (citation omitted) (internal quotation marks omitted)); MBS-Certified Pub. Accts., LLC v. Wis. Bell, Inc., 809 N.W.2d 857, 866 (Wis. 2012) ("[W]e will liberally construe remedial statutes to suppress the mischief and advance the remedy that the legislature intended to afford." (citation omitted) (internal quotation marks omitted)).

that these requirements conform to the SOI laws. In addition, any exception to these remedial statutes, such as for minimum-income or credit requirements, must be narrowly construed to maximize deterrence of discriminatory conduct.[203]

Second, "[w]hen interpreting statutory language, the spirit and purpose of the act and the objects to be accomplished must be considered. The legislative intent is the great and controlling principle."[204] Striking down minimum-income

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[203] *See*, *e.g.*, Canady v. Prescott Canyon Ests. Homeowners Ass'n, 60 P.3d 231, 233 (Az. Ct. App. 2002) ("Because it is a broad remedial statute, its provisions are to be generously construed and its exemptions must be read narrowly." (citations omitted) (internal quotation marks omitted)); United Riggers & Erectors, Inc. v. Coast Iron & Steel Co., 416 P.3d 792, 802 (Cal. 2018) ("In light of that remedial purpose, we construe the right broadly and exceptions to its application narrowly."); Atlanta J. v. Babush, 364 S.E.2d 560, 563 (Ga. 1988) (Weltner, J., dissenting) ("[I]t follows necessarily that to construe the Act broadly requires that its exceptions be construed narrowly."); Barrett v. Fontbonne Acad., No. NOCV2014-751, 2015 WL 9682042, at *7 (Mass. Super. Ct. Dec. 16, 2015) ("[T]he courts usually construe narrowly any exceptions to remedial statutes addressing a broad public policy concern such as prohibition of employment discrimination. If the principle of narrow interpretation of exemptions is a tie breaker, it helps to break the tie (or near-tie) in this case." (citations omitted) (internal quotation marks omitted)); McVeigh v. Fetterman, 116 N.E. 518, 520 (Ohio 1917) ("Exceptions in such [remedial] statutes are strictly construed, and cannot be enlarged even from considerations of apparent hardship or inconvenience." (citation omitted)); McNeil v. Hansen, 731 N.W.2d 273, 277 (Wis. 2007) ("If a statute is liberally construed, it follows that the exceptions must be narrowly construed." (citations omitted) (internal quotation marks omitted)); N.Y. EXEC. LAW § 300 ("Exceptions to and exemptions from the provisions of this article shall be construed narrowly in order to maximize deterrence of discriminatory conduct.").

[204] Albright v. Metz, 672 N.E.2d 584, 588 (N.Y. 1996) (citation omitted) (internal quotation marks omitted); *see*, *e.g.*, Hoffmann v. Young, 515 P.3d 635, 640 (Cal. 2022) ("Our task is to ascertain the Legislature's intent and effectuate the enactment's purpose."); Comm'n on Hum. Rts. & Opportunities v. Sullivan Assocs., 739 A.2d 238, 250 (Conn. 1999) ("[W]e should not read into a remedial statute [i.e., the SOI statute] an unstated exception that would undermine the legislature's manifest intent to afford low income families access to the rental housing market."); McCloud v. State, 260 So. 3d 911, 914 (Fla. 2018) ("The purpose of this endeavor is to effectuate the Legislature's intent because legislative intent is the polestar that guides a court's statutory construction analysis." (citations omitted) (internal quotation marks omitted)); People *ex rel.* Nelson v. Olympic Hotel Bldg. Corp., 91 N.E.2d 597, 699-600 (Ill. 1950); Montgomery Cnty. v. Glenmont Hills Assocs., 936 A.2d 325, 341 (Md. 2007); United Tel. Co. v. Limbach, 643 N.E.2d 1129, 1131 (Ohio 1994) ("The interpretation and application of statutes must be viewed in a manner to carry out the legislative intent of the sections." (citations omitted)); Atlanticare Med. Ctr. v. Comm'r of the Div. of Med. Assistance, 785 N.E.2d 346, 350 (Mass. 2003) ("In discerning a statute's meaning, we interpret the words used in a statute with regard to both their literal meaning and the purpose and history of the statute within which they appear." (citation omitted) (internal quotation marks omitted)); State v. Schwartz, 957 N.W.2d 414, 418 (Minn. 2021) ("The objective of statutory interpretation is to ascertain and effectuate legislative intent." (citation omitted)); Wichert v. Cardwell, 812 P.2d 858, 862 (Wash. 1991) ("[W]e so construe the statute as to give meaning to its spirit and purpose . . ."); State v. Maestas, 299 P.3d 892,

requirements for those with full vouchers is wholly consonant with the spirit and purpose of the SOI laws. The legislative history of the New York City SOI law, for example, makes clear that the legislature's intent was to assist homeless and indigent individuals with housing vouchers to secure housing regardless of financial circumstances. New York City Council ("Council") Member Miguel Martinez, in voting aye, decried what he described as "[a]n unfair practice and a discriminatory practice to tell one that even though you may have the source to pay the rent, but, however, it's not a four or three digit salary, that you're not eligible or you're not good enough to rent the apartment."[205] Council Speaker Christine Quinn similarly observed:

> It means that if you go to rent an apartment and you have the ability to pay, regardless of whether your ability to pay is money that's in a Section 8 voucher, in Social Security, in some other government program, if you have the ability to pay, the landlords will not be able to turn you away.[206]

The Council emphasized, moreover, that the SOI law aimed to reduce homelessness and to foster integration of voucher holders:

> [The SOI law] will assist thousands of New Yorkers with limited incomes to find and keep affordable housing of their choosing. And this is crucial, particularly now as New York City is facing an urgent affordable housing crisis, and the number of families with children [in] homeless shelters hit a record high a few months ago, something this Committee has been very focused on.[207]

As a pre-enactment report of the Council's Committee on General Welfare explained, protecting and expanding the use of vouchers "cuts down on local spending on public housing and increases integration of low-income voucher holders into diverse communities."[208]

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947 (Utah 2012) ("When interpreting a statute, our primary objective is to give effect to the legislature's intent." (citation omitted) (internal quotation marks omitted)).

[205] *Transcript of the Minutes of the Stated Council Meeting, City Council, City of N.Y.*, 61:25-62:6 (Mar. 26, 2008).

[206] *Transcript of the Minutes of the Stated Council Meeting, City Council, City of N.Y.*, 31:11-17 (Jan. 30, 2008).

[207] *Transcript of the Minutes of the New York City Council Committee on General Welfare* at 2:18 to 3:2 (Mar. 26, 2008).

[208] COMM. ON GEN. WELFARE, COUNCIL REP. OF THE GOV. AFFAIRS DIV. 9 (Dec. 12, 2007); *accord Ests. NY Real Est. Servs. LLC v. City of New York*, 125 N.Y.S.3d 79, 83 (N.Y. App. Div. 2020) ("[T]he City Council stated that Local Law 10 would help maintain affordable housing by maximizing the use of Section 8 vouchers or other forms of governmental rent payment in the City . . . . It was further contemplated that there would be other positive effects, such as reducing the level of homelessness and all the dislocation of families in the city.").

Rejecting individuals with full vouchers based upon low income, when they have no rent share whatsoever, plainly violates the spirit and purpose of the SOI laws. As the NYSDHR has observed: "Persons receive vouchers because they have low income and lack wealth. Unreasonable wealth requirements could exclude everyone with a voucher and negate the intended protections of the law."[209] Their difficult financial circumstances are the very reason they require the assistance of a housing subsidy. Hence, the individuals the law was intended to protect—the homeless and those of low income—would in practice be categorically excluded, despite possessing a full housing subsidy from the government.[210] The purpose of the law would be entirely defeated. And finally, permitting these requirements for full voucher holders would render the SOI laws meaningless, in violation of the established rule that statutes should not be construed in a manner that would render them meaningless.[211]

(a) Partial Vouchers

Where applicants have only a partial housing voucher, voucher programs significantly limit the holder's rental contribution. These programs apply a rent cap—a cap on the percentage of income that voucher holders must contribute to the rent—to ensure that they are not forced to pay an unreasonable percentage of their

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[209] N.Y. GUIDANCE, *supra* note 68, at 5.

[210] *See*, *e.g.*, Olivierre v. Parkchester Pres. Co., No. 452058, 2022 N.Y. Misc. LEXIS 8789, at *11 (N.Y. Sup. Ct. July 28, 2022) ("[I]f every landlord enforced minimum income requirements in this fashion, the spirit of source of income discrimination law[s] would be subverted and rendered meaningless.").

[211] *See*, *e.g.*, Sisemore v. Master Fin., Inc., 60 Cal. Rptr. 3d 719, 742–43 (Cal. Ct. App. 2007) (rejecting narrow interpretation of SOI law, *inter alia*, because it "would make the apparent broad protections against source-of-income discrimination found in nine different subdivisions of [the law] virtually meaningless" (citations omitted) (internal quotation marks omitted)); People v. Terry, 791 P.2d 374, 376 (Colo. 1990) ("Courts should attempt to give effect to all parts of a statute, and constructions that would render meaningless a part of the statute should be avoided." (citation omitted)); Hawkins v. Ford Motor Co., 748 So. 2d 993, 1000 (Fla. 1999) ("We are compelled by well-established norms of statutory construction to choose that interpretation of statutes and rules which renders their provisions meaningful." (citation omitted) (internal quotation marks omitted)); Flemings v. Contributory Ret. Appeal Bd., 727 N.E.2d 1147, 1148 (Mass. 2000) ("If a sensible construction is available, we shall not construe a statute to make a nullity of pertinent provisions or to produce absurd results."); Forte v. Sup. Ct. of New York, 397 N.E.2d 717, 722 (N.Y. 1979) ("Thus, we decline the respondents' invitation to interpret the statute in such a way as to render it essentially meaningless."); Lee v. Gore, 717 S.E.2d 356, 361 (N.C. 2011) (declining an interpretation that would "render meaningless" a statutory requirement); Taylor v. Redmond, 571 P.2d 1388, 1390 (Wash. 1977) ("[I]t is a fundamental principle of statutory construction that courts must not construe statutes so as to nullify, void or render meaningless or superfluous any section or words of same." (citations omitted)).

income to rent and are thus able to meet their rental obligations.[212] As one judge explained, "[t]his way, the family is not forced to choose between food, shelter, and clothing when allocating its limited resources."[213] The HCV (Section 8) program, for example, also adjusts the voucher holder's monthly income—and thus monthly rent contribution—through deductions for each dependent family member; unreimbursed medical expenses; unreimbursed attendant care; and reasonable childcare expenses necessary to enable family members to secure and maintain employment or to further their education.[214]

For those with partial vouchers, then, applying minimum-income ratios to the entire rent, rather than merely the voucher holder's portion of the rent, is similarly irrational, unreasonable, and in bad faith, and it plainly violates the SOI laws, as all of the courts and commissions to examine this issue have concluded.[215] The analysis here mirrors one for full voucher holders. Minimum-income requirements not tied to the voucher holder's portion obviously run afoul of express statutory provisions requiring computation based solely upon the holder's share,[216] and such computations cannot be considered reasonable or in good faith.[217] Similarly, these requirements constitute discrimination in the terms and conditions of rental, for like those with full vouchers, partial voucher holders are *singularly* forced to meet income requirements unrelated to—and far greater than—their share of the rent.[218] These requirements likewise should be considered direct evidence of discrimination under statutes expressly prohibiting the imposition of disparate terms or conditions,[219] and in any event, as the authorities have concluded, there is no reasonable justification for this disparate treatment.[220]

Upholding minimum-income ratios unrelated to rental contribution would also (a) violate the mandate to interpret remedial statutes broadly and liberally in plaintiffs' favor;[221] (b) violate the spirit and purpose of the SOI laws;[222] and (c) render the laws meaningless.[223] In fact, voucher programs already calculate voucher holders' rent share based upon their income (or lack thereof), thereby ensuring their

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[212] *See*, *e.g.*, Salute v. Stratford Greens, 888 F. Supp. 17, 18 (E.D.N.Y. 1995) ("Under the Section 8 program, a certificate holder pays a maximum of 30% of his income toward rent, and the federal government pays the difference."); N.Y. SOC. SERVS. LAW § 131-a(15) ("each public assistance recipient living with medically diagnosed HIV infection . . . may not be required to pay more than thirty percent of his or her monthly earned and/or unearned income toward the cost of rent").

[213] Williams v. New York City Hous. Auth., No. 81 Civ. 1801, 1994 WL 323643, at *1 (S.D.N.Y. July 5, 1994).

[214] *See* 24 C.F.R. § 5.611.

[215] *See* discussion *supra* Section II.A.2.

[216] *See* discussion *supra* note 61 and accompanying text.

[217] *See* discussion *supra* note 60 and accompanying text.

[218] *See* discussion *supra* Section III.A.1.

[219] *See* discussion *supra* notes 194–98 and accompanying text.

[220] *See* discussion *supra* note 199 and accompanying text.

[221] *See* discussion *supra* notes 200–02 and accompanying text.

[222] *See* discussion *supra* notes 204–08 and accompanying text.

[223] *See* discussion *supra* note 211 and accompanying text.

ability to pay.[224] Hence, there is no justification for imposing additional income requirements on voucher holders, as the NYCHRC has determined: "Where the tenants' rental portion is calculated based on the tenants' income, it is a violation of the [SOI] Law to impose any additional income requirements on applicants for housing."[225]

Because the proof of disparate treatment under these circumstances is so strong, and because there can be no reasonable justification for this treatment, there is no need to resort to a disparate impact theory of discrimination.[226] Undoubtedly, however, minimum-income requirements have a disparate and discriminatory impact upon voucher holders, and here, too, there can be no "legitimate rationale"[227] for imposing additional income requirements upon voucher holders.

We now turn to minimum-credit requirements for those with both full and partial vouchers.

B. Minimum Credit Requirements

1. Full Vouchers

For those with full vouchers, the government generally issues full payment to the landlord each month for the full amount of the rent.[228] The voucher holders' credit, then, is irrelevant. The government is entirely responsible for the rent, and thus the only credit rating at issue is that of the government. Put another way, while credit checks for those responsible for paying their rent may serve a purpose in assessing payment ability and reliability, such checks are wholly irrelevant for those who have no rent payment responsibility.

Critically, defendants in such cases do not conduct a credit check of the government—the actual payor of rent. Instead, they run the credit of the voucher holder—who is not responsible for paying any of the rent—and then reject the application based upon the holder's irrelevant credit rating. This is a violation of the SOI laws, for in such instances, a landlord cannot "establish[] any rational relationship between the plaintiff's credit report and [defendant's] legitimate

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[224] *See* discussion *supra* notes 212–14 and accompanying text.

[225] *Best Practices*, *supra* note 65.

[226] *See, e.g.*, Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 524 (2015) ("[A] plaintiff bringing a disparate-impact claim challenges practices that have a disproportionately adverse effect on minorities and are otherwise unjustified by a legitimate rationale." (citation omitted) (internal quotation marks omitted)).

[227] *See id.*

[228] *See*, *e.g.*, L.C. and Fair Hous. Just. Ctr., Inc. v. LeFrak Org., Inc., 987 F. Supp.2d 391, 396 (S.D.N.Y. 2013) ("HASA also provides direct-vendor checks for a full month's rent in each of the succeeding months that the HASA client occupies the apartment."); T.K. v. Landmark W., 802 A.2d 609, 614 (N.J. Super. Ct. 2001) ("Section 8 would cover the full rental payment for a one-bedroom apartment . . . .").

concern that plaintiff has the means to pay the rent."[229] As one commentator has observed:

> As source of income protections increase, landlords are more likely to rely on other measures such as credit scores to eliminate tenants they see as undesirable. Because most low-income clients have bad credit, credit scores are the next big barrier for Section 8 HCV recipients. But if mobility programs [i.e., vouchers] guarantee rent, landlords will be unable to argue that business necessity requires them to take into consideration the credit scores of prospective tenants.[230]

In short, for full voucher holders, it is only the credit of the entity-payor that is relevant. Imposing minimum-credit requirements upon voucher holders in such circumstances is both illogical and discriminatory.[231]

2. Partial Vouchers

Where the voucher holder pays a share of the rent, landlords argue that they have a legitimate interest in credit, since they need to determine whether the applicants will responsibly pay their share of the rent. Perfunctory and sweeping assertions of the need to check creditworthiness, however, cannot pass muster, for like minimum-income requirements, credit requirements, "even when uniformly applied to all prospective tenants . . . may unreasonably exclude voucher holders . . . and consequently many low-income and disabled persons who rely on rental assistance programs."[232]

Voucher holders typically have poor credit.[233] Their difficult financial circumstances are, again, the reason they require the assistance of a housing voucher.

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[229] *T.K.*, 802 A.2d at 614; *accord* Short v. Manhattan Apts., Inc., 916 F. Supp.2d 375, 401 (S.D.N.Y. 2012) ("[I]t remains unclear why an early credit check was necessary for HASA clients when their rents were guaranteed by the city."); Bronson v. Crestwood Lake Section I Holding Corp., 724 F. Supp. 148, 157 (S.D.N.Y. 1989) (stating that where rental payments guaranteed, concerns with creditworthiness not a "legitimate justification[] for denying plaintiffs tenancies"); *Best Practices*, *supra* note 65, at 2 ("If the voucher/subsidy covers 100% of the rent, you may not reject an applicant based on credit history or score."); N.Y. GUIDANCE, *supra* note 68, at 5 ("[W]here the vouchering agency pays 100% of the rent, consideration of negative credit history would be unreasonable."); *see supra* Sections II.A.1. and II.A.2.

[230] Insalaco, *supra* note 2, at 579–80.

[231] Additional analysis of this issue mirrors that of minimum-income requirements for those with full vouchers, so for the sake of brevity, see *supra* Section III.A.1.

[232] Finding of Probable Cause, *supra* note 70, at 5.

[233] *See*, *e.g.*, Vicki Been and Leila Bozorg, *Spiraling: Evictions and Other Causes and Consequences of Housing Instability,* 130 HARV. L. REV. 1408, 1427 (2017) ("[E]ven if a landlord is willing to accept the household and the voucher, low-income households often

Hence, the very individuals the SOI laws are intended to protect may be largely excluded based upon their poor credit. To take but one example, many victims of domestic violence "have poor credit histories either because their batterers have used victims' credits for their own benefit or because they have been unable to pay their bills on time due to their spotty income streams."[234] If such applicants can be summarily rejected because of sweeping credit requirements, they and their children will be excluded from the rental market and forced to wallow in the homeless system, or on the streets.

Accordingly, several principles should apply to ensure that credit scores or history "not be used in a way that frustrates the purpose of the Law."[235] First, of course, landlords cannot impose more stringent credit requirements upon voucher holders.[236] Second, just as the Washington, D.C. SOI statute provides, landlords should not be permitted to deny voucher holders based upon "credit issues that arose during a period in which the prospective tenant did not have an income-based housing subsidy if the housing provider could reasonably have known the date of receipt [of the voucher],"[237] or if the provider is so informed.

Rent burdens are far greater for low-income individuals.[238] "The typical renter in the bottom quintile of the income distribution spends more than half of monthly

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have . . . poor credit histories . . . ."); John J. Amman, *Housing Out the Poor*, 19 ST. LOUIS U. PUB. L. REV. 309, 316 (2000) ("to be poor often means to have a myriad of problems including bad credit").

[234] *See*, *e.g.*, Margo Lindauer, *"Please Stop Telling Her to Leave." Where Is the Money: Reclaiming Economic Power to Address Domestic Violence*, 39 SEATTLE U. L. REV. 1263, 1266 (2016). *See also*, Peter W. Salsich & John J. Ammann, *Non Profit Housing Providers: Can They Survive the 'Devolution Revolution'?,* 16 ST. LOUIS U. PUB. L. REV. 321, 340 ("[V]irtually all the applicants [for housing assistance] have bad credit. That is why they need housing assistance."); Rasheedah Phillips, *Addressing Barriers to Housing for Women Survivors of Domestic Violence and Sexual Assault*, 24 TEMP. POL. & C. R. L. REV. 323, 328–29 (2015) ("A victim may have a bad credit history and landlord-tenant money judgments against her because the abuser had control of the victim's finances, leaving her unable to pay her bills and rent, or because the abuser stole the victim's identity and ruined her credit.").

[235] N.Y. GUIDANCE, *supra* note 68, at 5.

[236] *See*, *e.g.*, Pasquince v. Brighton Arms Apts., 876 A.2d 834, 842 (N.J. Super. Ct. 2005) ("The situation might be different if there was evidence that [defendant] deviated from its creditworthiness criteria for non-Section 8 applicants."); COLO. REV. STAT. ANN. § 24-34-502(1.5) (allowing credit checks "provided that the landlord checks the credit of every prospective tenant").

[237] D.C. CODE ANN. § 2-1402.21(g)(C).

[238] *See*, *e.g.*, Will Fischer, Sonya Acosta & Erik Gartland, *More Housing Vouchers: Most Important Step to Help More People Afford Stable Homes* (May 13, 2021), https://www.cbpp.org/research/housing/more-housing-vouchers-most-important-step-to-help-more-people-afford-stable-homes [https://perma.cc/6C6J-DZ4Q] ("Millions of U.S. households with low incomes must pay very high shares of those incomes in order to afford housing."); National Low Income Hous. Coal., Census Bureau Releases Data from 2019 ACS (Sept. 28, 2020), https://nlihc.org/resource/census-bureau-releases-data-2019-acs

income on rent and has less than $500 dollars left after paying rent."[239] When such a large percentage of income must go to rent, low-income renters are particularly vulnerable to financial crises, and thus to credit problems.[240] Housing vouchers are designed to provide low-income individuals with financial stability and the capacity to meet what is typically their biggest financial obligation. Limiting the voucher holders' rent share does precisely that, determining what portion of the rent the holders can afford to pay in light of their income[241] and making it far less likely that they will default on their share.[242] Credit issues that arose before receipt of the voucher are not a fair indicator of the voucher holders' likelihood to meet their rent obligations after securing this critical assistance.

Third, so as not to exclude otherwise eligible voucher holders, landlords should be required to conduct an individualized assessment of credit, providing the voucher holder an opportunity to explain negative entries and to demonstrate sufficient creditworthiness.[243]

Finally, if a landlord does not engage in an individualized credit assessment, Portland, Oregon's scheme provides an excellent guidepost for items that should not

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[https://perma.cc/CM5D-Q7KH] ("The U.S. Census Bureau released new aggregate tables from the 1-Year 2019 . . . . Of 41,048,717 renter households with positive incomes who paid cash rent in 2019, 19,881,539 (48.4%) were housing cost burdened. Among the 8,781,716 renters with incomes less than $20,000 that paid cash rent, 7,739,142 (88.1%) were housing cost burdened."); Jeff Larrimore & Jenny Schuetz, *Assessing the Severity of Rent Burden on Low-Income Families* (Dec. 22, 2017), https://www.federalreserve.gov/econres/notes/feds-notes/assessing-the-severity-of-rent-burden-on-low-income-families-20171222.html [https://perma.cc/HAX6-VQP4] ("Housing costs are a severe financial burden to many low-income families.").

[239] Larrimore & Schuetz, *supra* note 238.

[240] *See*, *e.g.*, Baaba Halm & Harry B. Bronson, *The State Housing Voucher N.Y. Needs*, NEW YORK DAILY NEWS (Mar. 15, 2022, 5:00 AM), https://www.nydailynews.com/opinion/ny-oped-ny-state-housing-voucher-20220315-pplmtzms3rhc3e72k3djsiljie-story.html [https://perma.cc/N33J-UUM7] ("When an outsize percentage of income goes to rent and utilities, any unexpected costs leave renters vulnerable."); Fischer et al., *supra* note 238 ("Millions of U.S. households with low incomes must pay very high shares of those incomes in order to afford housing. The costs can force families to divert resources from other basic needs and leave them one setback—such as a reduction in work hours or an unexpected bill—away from losing their homes.").

[241] *See* discussion *supra* notes 212–14 and accompanying text.

[242] In New York, for example, "only 1 percent of [homeless] families that exit shelter with rental assistance return to shelter, compared to 20 percent without rental assistance." Chloe Sarnoff & Casey Berkovitz, *Strengthening Housing Stability and Increasing Opportunity for Low-Income Families in New York City,* NEXT 100 (July 21, 2021), https://thenext100.org/strengthening-housing-stability-and-opportunity-for-low-income-families-in-new-york-city/ [https://perma.cc/G59F-23RL] (citation omitted).

[243] *See*, *e.g.*, *Best Practices*, *supra* note 65, at 2 (requiring "case-by-case" consideration of credit); N.Y. GUIDANCE, *supra* note 68, at 5 ("Housing applicants must be individually considered on a case-by-case basis."); PORTLAND HOUS. BUREAU, *supra* note 81, at 16 (requiring either use of delineated criteria or an individual assessment of credit, with an opportunity for applicants to "explain, justify, or negate" negative information).

be used as grounds to exclude voucher holders, including insufficient credit history ("unless an applicant in bad faith withholds credit history information that might otherwise form the basis for a denial"); past-due unpaid obligations less than $1,000; a balance owed for prior rental property damage less than $500; a bankruptcy that has been discharged or is under active repayment; and medical or education/vocational training debt.[244]

In short, one size does not fit all when it comes to credit checks. Instead, "[e]ach applicant should be considered on a case-by-case basis," and "the applicant should be provided an opportunity to demonstrate ability to timely pay their portion of the rent,"[245] notwithstanding, for example, poor credit arising before receipt of a voucher. That is the only way to ensure against seemingly neutral credit requirements that have the intent or effect of frustrating the purpose of the SOI laws.

CONCLUSION

Vouchers can make an enormous difference, among other things allowing holders—disproportionately people of color, the disabled, and women—to move to areas of higher opportunity, lower crime, and better schools, as studies have demonstrated. Indeed:

> A rigorous long-term study found that children whose families used vouchers to move from high- to low-poverty neighborhoods—which often have better-resourced, higher-performing schools—had substantially higher adult earnings and rates of college attendance and lower rates of single parenthood as young adults than similar children whose families stayed in poor neighborhoods. Adults in these families experienced improved mental health, and lower rates of diabetes and extreme obesity, outcomes researchers concluded may stem in part from reduced stress due to reduced exposure to crime.[246]

SOI discrimination closes the door on these opportunities, not only severely restricting the choices—and lives—of voucher holders, but causing them profound emotional distress, usually visited upon individuals already laboring under society's prejudices.

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[244] PORTLAND HOUS. BUREAU, *supra* note 81, at 14.

[245] *Best Practices*, *supra* note 65, at 2.

[246] Fischer et al., *supra* note 238 (citations omitted); *accord* Fasanelli & Tegeler, *supra* note 52, at 58 ("We know the strong health, educational, and economic benefits for families and children who move from high-poverty to low-poverty neighborhoods."); Peter Bergman, Raj Chetty, Stefanie DeLuca, Nathaniel Hendren, Lawrence F. Katz & Christopher Palmer, *Creating Moves to Opportunity: Experimental Evidence on Barriers to Neighborhood Choice* 1 (NAT'L BUREAU OF ECON RSCH, WORKING PAPER N. 26164, 2019) (revised Jan. 2023) ("Recent research has established that children's outcomes in adulthood vary substantially across neighborhoods and that moving to higher opportunity neighborhoods earlier in childhood improves children's outcomes significantly." (citation omitted)).

In the early days after enactment of SOI laws, this discrimination can be brazen and blatant, but as one commentator has observed, "[p]retextual phoenixes may yet arise from the ashes of the landlords' 'NO SECTION 8' signs."[247] Those phoenixes have in fact arisen in the form of minimum-income and minimum-credit requirements, which have the superficial patina of neutrality, but upon inspection almost inevitably constitute discrimination against voucher holders, and often plainly so. In this, by design or operation, they are in many ways akin to the second-generation "grandfather clauses"[248] of the late 19th and early 20th century: ostensibly neutral[249] but in fact sweepingly exclusionary of the protected class, as the Supreme Court recognized in striking down these requirements over 100 years ago.[250]

New York's highest court observed that in assessing a claim of discrimination, a court should be guided by the principle that "discrimination is rarely so obvious or its practices so overt that recognition of it is instant and conclusive, it being accomplished usually by devious and subtle means."[251] Income and credit requirements are a blend of both: when applied to those with full vouchers, the discrimination is obvious, uniquely subjecting voucher holders to unreasonable criteria not imposed upon others—and thus not even ostensibly neutral. When applied to those with a rent share, more "devious and subtle" requirements sweepingly exclude the vast majority of voucher holders *inter alia* by failing to credit the government's guaranteed share of the rent (again, in a disparate rather than neutral manner), or by depriving applicants of the opportunity to demonstrate that pre-voucher credit issues are no longer relevant.[252]

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[247] Andrew Chandler, *Tearing Down "No Section 8" Signs: The Disparate Racial Impact of Source-of-Income Discrimination and the Validity of Louisville's New Law Against It*, 60 U. LOUISVILLE L. REV. 127, 148 n.171(2021).

[248] Seeking to disenfranchise African American voters and to defeat the 14th and 15th Amendments through ostensibly lawful means, in the late 19th and early 20th century, numerous states adopted allegedly neutral poll taxes and/or literacy tests, and combined these with "grandfather clauses." *See*, *e.g.*, Rossito-Canty v. Cuomo, 86 F. Supp. 3d 175, 187 (E.D.N.Y. 2015) (noting the phenomenon of "states imposing poll taxes and literacy tests, along with the infamous 'grandfather clause' as means to restrict the vote while not running afoul of the Fourteenth and Fifteenth Amendments"). The latter exempted voters from the poll tax or literacy test if they were eligible to vote before passage of the 15th Amendment, a means of excluding the vast majority of African Americans. *See, e.g.*, Guinn v. United States, 238 U.S. 347 (1915).

[249] *See*, *e.g.*, Shaw v. Reno, 509 U.S. 630, 639 (1993) ("Ostensibly race-neutral devices such as literacy tests with 'grandfather' clauses . . . were devised to deprive black voters of the franchise.").

[250] *See Guinn*, 238 U.S. 347.

[251] 300 Gramatan Ave. Assocs. v. State Div. of Hum. Rts, 45 N.Y.2d 176, 183 (1978) (citations omitted).

[252] *See* Uprety, *supra* note 57 ("Sometimes, however, discrimination is more subtle—including setting minimum income requirements that are incorrectly calculated for voucher holders.").

Like the relevant agencies in New Jersey, New York, Virginia, Chicago, and Portland, those responsible for enforcing the SOI laws should issue guidelines clearly delineating the ways in which income and credit requirements may run afoul of the law. In the meantime, this Article should leave no doubt that such requirements can never be implemented "in a way that has either the intent or effect of frustrating the purpose of the law."[253]

[253] VIRGINIA GUIDANCE, *supra* note 28, at 8.